TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 57

UNITED STATES, PETITIONER

vs.

GAETANO LUCCHESE, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1960
CERTIORARI GRANTED MAY 16, 1960

Supreme Court of the United States

OCTOBER TERM, 1960

No. 57

UNITED STATES, PETITIONER

vs.

GAETANO LUCCHESE, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. 1] **IN UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF NEW YORK

Civil Action #13052

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT

COMPLAINT—Filed November 17, 1952

The United States of America, by FRANK J. PARKER, United States Attorney for the Eastern District of New York, herewith presents it complaint under and pursuant to Section 338 of the Nationality Act of 1940, 54 Stat. 1158 (U.S.Code, Title 8, Section 738), against GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, and respectfully represents:

1. That the said defendant was born in Italy on December 1, 1899, and was prior to the 25th day of January, 1943 a citizen of Italy.

2. That the said defendant entered the United States on the 21st day of November, 1911, and now resides within the Eastern District of New York and within the jurisdiction of this Court.

3. That on the 21st day of November, 1941, the said defendant filed his petition for naturalization #51652 in the District Court of the United States for the District of New Jersey, Newark, New Jersey.

4. That on the 25th day of January, 1943, the said United States District Court for the District of New Jersey, relying on the truth and good faith of the repre-

sentations made by the said defendant in his petition for naturalization, entered its order admitting him to citizenship in the United States and thereupon Certificate of Naturalization, #5701024, was issued to him on January [fol. 2] 30, 1943 by the Clerk of said Court.

5. That the said defendant, prior to November 21, 1941, filed with the United States Immigration and Naturalization Service an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization in which he certified in writing, in answer to the printed question whether he had ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation, that at age of 20 he had been arrested and convicted for theft of an automobile and sentenced to three years and nine months.

6. That the said defendant, on November 21, 1941, during an examination preliminary to the filing of the aforesaid petition for naturalization did testify under oath before a United States Naturalization Examiner that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which he served two years and nine months.

7. That the said defendant, on November 21, 1941, during a hearing subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner, who was duly designated by said Court to conduct such hearing, that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which term he served two years and nine months.

8. That the aforesaid representations made by the said defendant as to his criminal record were false and fraudulent.

9. That in fact and in truth, in addition to the arrest admitted by the defendant as aforesaid, he had prior to [fol. 3] November 21, 1941 been arrested on five other occasions as follows:

on or about August 30, 1927 in New York, N. Y. the defendant was arrested under the name of Thomas Arra on a charge of criminally receiving stolen goods;

on or about July 18, 1928 in New York, N. Y. the defendant was arrested under the name of Thomas Lucase on a charge of homicide (gun);

on or about September 8, 1930 in New York, N. Y. the defendant was arrested under the name of Thomas Luckese on a charge of homicide;

or or about July 4, 1931 the defendant was fingerprinted by the Cleveland, Ohio, Police Department for investigation;

on or about November 18, 1935 the defendant was arrested in New York, N. Y. under the name of Thomas Lucase on a charge of vagrancy.

10. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

11. That in the Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization filed by the said defendant with the United States Immigration and Naturalization Service prior to November 21, 1941, he certified in writing that his full true name and any other name which had been used were Gaetano Lucchese, also known as Thomas Lucchese.

12. That the said defendant on November 21, 1941 during the aforementioned examination preliminary to

the filing for the petition for naturalization testified under oath before a United States Naturalization Examiner that he had never used or been known by any other name than Gaetano Lucchese and Thomas Lucchese.

[fol. 4] 13. That the said defendant on November 21, 1941 during the aforementioned hearing conducted subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner who was duly designated by said Court to conduct such a hearing, that he had never used or been known by any other name other than Gaetano Lucchese and Thomas Lucchese.

14. That the aforesaid representations made by the said defendant as to his name were false and fraudulent.

15. That in fact and in truth in addition to the names Gaetano Lucchese and Thomas Lucchese the defendant had used the name Thomas Arra when arrested in New York, N. Y. on or about August 30, 1957, for criminally receiving stolen goods.

16. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

17. That on December 16, 1940 the said defendant executed an Alien Registration Form pursuant to the Alien Registration Act of 1940 and regulations made thereunder in which he represented under oath that

a. his name was Gaetano Lucchese and that he was also known by the name of Thomas Lucchese

b. he had been arrested for larceny in 1920 at New York City, N. Y. for which he was sentenced to three years and nine months.

18. That the aforesaid representations were false and fraudulent in that

a. the defendant had in truth and in fact used the name of Thomas Arra when arrested in New York City in 1927 for criminally receiving stolen goods.

b. the defendant had been arrested five additional times as more fully stated in paragraph 9 above.

[fol. 5] 19. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

20. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that his only arrest was in New York City in 1920 for larceny whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

21. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

22. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that his only arrest was at the age of 20 in the County Court, Riverhead, Long Island, New York when he was convicted for theft of an automobile, whereas, in fact,

he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

[fol. 6] 23. That the naturalization of the said defendant was illegally and fraudulently procured.

24. That good cause exists for the institution of a suit under Section 338 of the Naturality Act of 1940 (8 U.S.C. 738) to set aside and cancel naturalization of the said Gaetano Lucchese as having been illegally and fraudulently procured.

WHEREFORE the plaintiff prays that the aforesaid Certificate of Naturalization No. 5701024, Petition No. 51652 and order of the United States District Court for the District of New Jersey at Newark, New Jersey entered on the 25th day of January 1943, whereby the defendant was admitted to be and became a citizen of the United States of America, be vacated, cancelled and set aside, and that said defendant be forever restrained and enjoined from setting up or claiming any rights, privileges, benefits, or advantages whatsoever under the said order, and said certificate of naturalization, and that the Clerk of this Court be directed to transmit a certified copy of the judgment to be entered herein, to the Immigration and Naturalization Service of the Department of Justice, at Washington, D. C. and that summons be issued out of and under the seal of this Court, directed to the defendant, commanding him, within sixty days after the service of a copy thereof upon him, exclusive of the day of service, to appear before this Court and then and there answer the complaint herein, and abide the order and decree of this Court, and that plaintiff have such other and further relief as to the Court may seem just and proper in the premises.

/s/ Frank J. Parker
United States Attorney
Eastern District of New York
Attorney for Plaintiff
519 Federal Building
271 Washington Street
Brooklyn 1, New York

[fol. 7] *Duly sworn to by Frank J. Parker. Jurat omitted in printing.*

[fol. 7A] • • • •

[fol. 7B] (File Endorsement Omitted)

[fol. 8] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civ. 13052

UNITED STATES OF AMERICA, PLAINTIFF

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT

AFFIDAVIT OF RALPH FARB—Filed November 23, 1955

STATE OF NEW YORK, COUNTY OF KINGS) ss:

RALPH FARB, being duly sworn, says: That he is an attorney for the Immigration and Naturalization Service, United States Department of Justice, and as such has access to the official records of the said Service.

That as more fully appears from the attached complaint of the United States against Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization for the following reasons:

1. The defendant fraudulently procured naturalization in that he misrepresented facts as to his name and identity and also as to his record of arrests.

2. The defendant's naturalization was illegally procured in that at the time of admission to citizenship he had not been for the period required by law, a person of good moral character, having both in naturalization

proceedings and in alien registration proceedings made false and fraudulent representations under oath.

/s/ Ralph Farb

Sworn to before me this 17th day of November, 1952

[SEAL] /s/ William H. Sperling
WILLIAM H. SPERLING.

Notary Public in the State of N. Y. No. 41-9125200. Qualified in Queens County. Certificates filed with Kings & Queens Co. Clk's & Reg. Off. Commission Expires March 30, 1954

[fol. 8A] AFFIDAVIT OF MAILING
(Omitted in printing)

* * * *

[fol. 8B] (File Endorsement Omitted)

[fol. 9] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESE, DEFENDANT

NOTICE OF AND MOTION TO DISMISS THE COMPLAINT—
Filed March 26, 1956

SIR:

PLEASE TAKE NOTICE that upon the complaint herein, and upon the affidavit of RALPH FARB sworn to November 17th, 1952 and filed on November 23rd, 1955, the undersigned will move this Court at a term thereof for the hearing of motions to be held at the United States Courthouse and Post Office Building, 271 Washington Street, Borough of Brooklyn, City of New York, on the 4th day of April, 1956 at 10:30 o'clock in the forenoon for an order dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor as required by Section 338 (a) of the Nationality Act of 1940 for the reasons that:

1. The affidavit of RALPH FARB fails to set forth facts showing good cause for the institution of the proceeding.
2. The affidavit of RALPH FARB shows upon its face that the proceeding was not instituted upon said affidavit.
3. The affidavit of RALPH FARB was not filed at the time the action was instituted, but was filed on November 23rd, 1955.

[fol. 10] and for such other and further relief as may be just and proper.

Dated, New York, N. Y., March 26th, 1956.

Yours, etc.,

/s/ Richard J. Burke,
Attorney for Defendant,
Office & P.O. Address,
60 Wall Street,
New York 5, N. Y.

To:

Leonard P. Moore, Esq.,
United States Attorney
Eastern District of New York
Attorney for Plaintiff
Federal Building,
Brooklyn, New York.

[fol. 10A] (File Endorsement Omitted)

[fol. 11] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

April, 11, 1956

Civ-13052

UNITED STATES OF AMERICA

vs.

GAETANO LUCCHESE

Before INCH, J.

Appearances: Richard J. Burke, Attorney for Defendant for Motion.

Leonard P. Moore, U. S. Attorney for Plaintiff by Elliott S. Greenspan, Asst. U. S. Attorney, in opposition.

Motion argued and submitted. Decision reserved.

MEMORANDUM OPINION DENYING MOTION TO DISMISS COMPLAINT—April 17, 1956

This is a motion to dismiss the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor. Two of the three contentions in support of this motion, set forth in the notice thereof as reasons 2 and 3, were passed on by me in my decision and order determining a prior motion to dismiss the complaint upon the ground that the United States Attorney had not filed an affidavit showing good cause for the institution of the proceeding. The third contention in support of this motion, set forth in the notice thereof as reason 1, is without merit. The affidavit filed by the United States Attorney is sufficient (United States v. Leles, 227 Fed. 189; United States v. Chandler, 132 Fed. Supp. 650). Therefore, this motion is, in all respects, denied. Settle order.

/s/ Robert Inch

April 17, 1956 Chief Judge, U. S. District Court

[fol. 12] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESE, DEFENDANT

ORDER DENYING MOTION TO DISMISS COMPLAINT—
April 30, 1956

At Brooklyn, New York, in said District, on the 30th day of April, 1956.

The defendant having moved by Notice of Motion dated March 26, 1956, for an order dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor as required by the Nationality Act of 1940, and after reading the aforesaid Notice of Motion and after hearing RICHARD J. BURKE, Esq., in support of the motion, and LEONARD P. MOORE, United States Attorney for the Eastern District of New York, ELLIOTT S. GREENSPAN, Esq., Assistant United States Attorney, of counsel, in opposition thereto, and upon filing the memorandum opinion of the Court,

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, attorney for the plaintiff, it is

ORDERED, that the defendant's Motion for an Order Dismissing the Complaint be and the same hereby is in all respects denied.

/s/ Robert Inch
United States District Judge

[fol. 12A] AFFIDAVIT OF MAILING
(Omitted in printing)

[fol. 12B] (File Endorsement Omitted)

[fol. 13] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

At 10:30 A.M.

Civ-13052

UNITED STATES OF AMERICA

- VS -

GAETANO LUCCHESE

Motion for an order granting the defendant leave to reargue said motions on the authority of the decision of the Supreme Court of the United States in the case entitled United States of America against Ettore Zucca, decided April 30, 1956 and for an order on such reargument dismissing the complaint.

Appearances: Richard J. Burke, Attorney for Defendant.

Leonard P. Moore, U. S. Attorney, for Plaintiff.

Motion Argued & Submitted

All Papers by July 2, 1956

MEMORANDUM OPINION—July 3, 1956

This is a motion by defendant for leave to reargue his motions to dismiss the complaint upon the ground that this denaturalization proceeding was not instituted upon the filing of an affidavit showing good cause therefor and, upon such reargument, for a dismissal of the complaint, on the authority of the decision in United States v. Zucca, 351 U.S. 91. In that case, the United States Supreme Court held that, in a denaturalization proceeding, such as the instant one, the filing of the affidavit showing good cause is a procedural prerequisite to the initiation and maintenance of the proceeding. Therefore, this motion is granted and, after such reargument, the complaint is dismissed, without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon the filing of the required affidavit. (United States v. Zucca, supra). Settle order.

/s/ Robert Inch

July 3, 1956. Chief Judge, U. S. District Court

[fol. 14] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESE, DEFENDANT

ORDER GRANTING MOTION FOR LEAVE TO REARGUE, ETC.—
October 15, 1956

At Brooklyn, New York, in said District, on the 15th day of October, 1956.

The defendant having moved by Notice of Motion dated June 11, 1956, for an order granting the defendant leave to reargue his motion dated October 27, 1955, for an order dismissing the complaint on the ground that this Court lacks jurisdiction of the subject matter, and for leave to reargue his motion dated March 26, 1956, for an order dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor, and for an order on such reargument dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor, and after reading the aforesaid Notice of Motion and after hearing RICHARD J. BURKE, Esq., MYRON L. SHAPIRO, Esq., of counsel, in support of the motion, and LEONARD P. MOORE, United States Attorney for the Eastern District of New York, ELLIOTT S. GREENSPAN, Esq., Assistant United States Attorney, of counsel, in opposition thereto, and upon filing the memorandum opinion of the Court it is

ORDERED, that the defendant's Motion for an Order granting leave to reargue is granted and it is further

ORDERED, that the complaint be dismissed without prejudice to the Government's right to institute a proceeding

to denaturalize the defendant upon the filing of the required affidavit.

/s/ Robert Inch
United States District Judge

• • • •

[fol. 14A] AFFIDAVIT OF PERSONAL SERVICE
(Omitted in printing)

[fol. 14B] (File Endorsement Omitted)

[fol. 15] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESE, DEFENDANT

NOTICE OF APPEAL—Filed November 9, 1956

NOTICE IS HEREBY GIVEN that the plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of United States District Judge Robert A. Inch, entered in this action on October 15, 1956, and from each and every part thereof.

Dated: Brooklyn, New York
November 9, 1956.

LEONARD P. MOORE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
271 Washington Street
Brooklyn, New York

By:
/s/ Elliott S. Greenspan
Assistant U. S. Attorney

To:

PERCY G. B. GILKES
CLERK, United States District Court,
Eastern District of New York,
271 Washington Street,
Brooklyn, New York

RICHARD J. BURKE, ESQ.,
Attorney for Defendant,
60 Wall Street,
New York, New York

[fol. 15A] • • • •

[fol. 15B] (File Endorsement Omitted)

[fol. 16] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 274—October Term, 1956.

Argued March 15, 1957

Docket No. 24424

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

—v.—

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT-APPELLEE

Before: HINCKS, STEWART and LUMBARD, *Circuit Judges.*

In an action by the government to cancel the defendant's naturalization for fraud and misrepresentation, under § 338(a) of the Nationality Act of 1940, 54 Stat. 1158, later amended by 66 Stat. 239 (1952), 8 U. S. C. A. § 1451 (a), the District Court for the Eastern District of New York, Inch, *J.*, dismissed the complaint for failure to file an affidavit of good cause at the time the action was instituted. Reversed.

[fol. 17] LEONARD P. MOORE, United States Attorney, Eastern District of New York, Brooklyn, N. Y. (Elliott S. Greenspan, Assistant United States Attorney, of counsel), *for plaintiff-appellant.*

RICHARD J. BURKE, New York, N. Y. (Myron L. Shapiro, of counsel), *for defendant-appellee.*

OPINION—June 17, 1957

LUMBARD, *Circuit Judge:*

This is a denaturalization action brought under § 338 (a) of the Nationality Act of 1940, 54 Stat. 1158,[1] later amended by 66 Stat. 239 (1952), 8 U. S. C. A. § 1451(a), in which the government appeals from an order dismissing its complaint for failure to file an affidavit of good cause at the commencement of the proceeding. The District Court held that filing the affidavit after the complaint did not comply with the statutory requirement. On the authority of *United States* v. *Matles*, decided June 10, 1957, we reverse.

Lucchese was naturalized in 1943. Prior to this, in 1941, he filed an application for a Certificate of Arrival and Preliminary Form for Petition of Naturalization, in which he admitted to one conviction for theft of an automobile in 1921 and swore that other than this he had never been arrested or charged with violation of the law. [fol. 18] He also swore to this on an Alien Registration Form on December 16, 1940 and reiterated it before a Naturalization Examiner at a hearing on November 21, 1941, preliminary to the filing of the naturalization petition.

On the Alien Registration Form, the application, and at the hearing, he also swore that he had never been known by any name other than either Gaetano Lucchese or Thomas Lucchese.

On November 17, 1952 the Government filed a verified complaint to denaturalize Lucchese under § 338(a) of the

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[1] Nationality Act of 1940:

Sec. 338(a). Revocation of Naturalization.

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured. [8 U. S. C., 1940 Ed.; Sec. 738(a).]

Nationality Act of 1940. In the complaint it was alleged (1) that Lucchese's statements about his criminal record were false for he had been arrested not once but many times, and the complaint listed the dates, places and charges of five arrests in addition to the one he had admitted to; (2) that he had lied in testifying about the names he had used, for he had also used the name "Thomas Arra" when arrested in 1927 for receiving stolen goods; (3) that all these misrepresentations were for the purpose of fraudulently procuring citizenship; and (4) that these misrepresentations indicated that he was not a person of good moral character during the period required by law. The details of the complaint are material to this appeal, and we therefore set them out in the margin.[2]

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2 * * * *

"3. That on the 21st day of November, 1941, the said defendant filed his petition for naturalization #51652 in the District Court of the United States for the District of New Jersey, Newark, New Jersey.

4. That on the 25th day of January, 1943, the said United States District Court for the District of New Jersey, relying on the truth and good faith of the representations made by the said defendant in his petition for naturalization, entered its order admitting him to citizenship in the United States and thereupon Certificate of Naturalization, #5701024, was issued to him on January 30, 1943 by (2) the Clerk of said Court.

5. That the said defendant, prior to November 21, 1941, filed with the United States Immigration and Naturalization Service an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization in which he certified in writing, in answer to the printed question whether he had ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation, that at age of 20 he had been arrested and convicted for theft of an automobile and sentenced to three years and nine months.

6. That the said defendant, on November 21, 1941, during an examination preliminary to the filing of the aforesaid petition for naturalization did testify under oath before a United States Naturalization Examiner that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, River-

[fol. 19] No affidavit of good cause was filed with the complaint on November 17, 1952. However, such an affi-

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head, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which he served two years and nine months.

7. That the said defendant, on November 21, 1941, during a hearing subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner, who was duly designated by said Court to conduct such hearing, that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which term he served two years and nine months.

8. That the aforesaid representations made by the said defendant as to his criminal record were false and fraudulent.

9. That in fact and in truth, in addition to the arrest admitted by the defendant as aforesaid, he had prior to November 21, 1941 been (3) arrested on five other occasions as follows:

on or about August 30, 1927 in New York, N. Y. the defendant was arrested under the name of Thomas Arra on a charge of criminally receiving stolen goods;

on or about July 18, 1928 in New York, N. Y. the defendant was arrested under the name of Thomas Lucase on a charge of homicide (gun);

on or about September 8, 1930 in New York, N. Y. the defendant was arrested under the name of Thomas Luckese on a charge of homicide;

on or about July 4, 1931 the defendant was fingerprinted by the Cleveland, Ohio, Police Department for investigation;

on or about November 18, 1935 the defendant was arrested in New York, N. Y. under the name of Thomas Lucase on a charge of vagrancy.

10. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

11. That in the Application for a Certificate of Arrival

[fol. 20] davit was apparently drawn up on that date, for the affidavit ultimately filed on November 23, 1955

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and Preliminary Form for Petition for Naturalization filed by the said defendant with the United States Immigration and Naturalization Service prior to November 21, 1941, he certified in writing that his full true name and any other name which had been used were Gaetano Lucchese, also known as Thomas Lucchese.

12. That the said defendant on November 21, 1941 during the aforementioned examination preliminary to the filing for the petition for naturalization testified under oath before a United States Naturalization Examiner that he had never used or been known by any other name than Gaetano Lucchese and Thomas Lucchese.

(4) 13. That the said defendant on November 21, 1941 during the aforementioned hearing conducted subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner who was duly designated by said Court to conduct such a hearing, that he had never used or been known by any other name other than Gaetano Lucchese and Thomas Lucchese.

14. That the aforesaid representations made by the said defendant as to his name were false and fraudulent.

15. That in fact and in truth in addition to the names Gaetano Lucchese and Thomas Lucchese the defendant had used the name Thomas Arra when arrested in New York, N. Y. on or about August 30, 1927, for criminally receiving stolen goods.

16. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

17. That on December 16, 1940 the said defendant executed an Alien Registration Form pursuant to the Alien Registration Act of 1940 and regulations made thereunder in which he represented under oath that

a. his name was Gaetano Lucchese and that he was also known by the name of Thomas Lucchese

b. he had been arrested for larceny in 1920 at New York City, N. Y. for which he was sentenced to three years and nine months.

18. That the aforesaid representations were false and fraudulent in that

a. the defendant had in truth and in fact used the name of

[fol. 21] was dated the same day as the verified complaint and referred to it as "the attached complaint." This affidavit, sworn to by Ralph Farb, an Attorney for the Immigration and Naturalization Service, stated:

Thomas Arra when arrested in New York City in 1927 for criminally receiving stolen goods

b. the defendant had been arrested five additional times as more fully stated in paragraph 9 above.

(5) 19. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

20. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that his only arrest was in New York City in 1920 for larceny whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

21. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

22. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that his only arrest was at the age of 20 in the County Court, Riverhead, Long Island, New York when he was convicted for theft of an automobile,

[fol. 22] "* * * [A]s more fully appears from the attached complaint of the United States against Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization for the following reasons:

1. The defendant fraudulently procured naturalization in that he misrepresented facts as to his name and identity and also as to his record of arrests.

2. The defendant's naturalization was illegally procured in that at the time of admission to citizenship he had not been for the period required by law, a person of good moral character, having both in naturalization proceedings and in alien registration proceedings made false and fraudulent representations under oath."

On October 27, 1955 Lucchese moved to dismiss the complaint for failure to file the affidavit. The government, on November 23, 1955, then filed the affidavit which was dated November 17, 1952, and Judge Inch denied the motion on the ground that the affidavit requirement had been satisfied.

On March 26, 1956 Lucchese again moved to dismiss on the grounds that (1) the affidavit failed to set forth the [fol. 23] facts showing good cause for the institution of the proceeding; (2) the affidavit itself showed that the action was not based on the affidavit; (3) the affidavit was filed after the complaint. Judge Inch again denied the motion.

After the decision in *United States* v. *Zucca*, 351 U.S. 91 (April 30, 1956), Lucchese moved to reargue his mo-

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whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

(6) 23. That the naturalization of the said defendant was illegally and fraudulently procured.

24. That good cause exists for the institution of a suit under Section 338 of the Nationality Act of 1940 (8 U.S.C. 738) to set aside and cancel naturalization of the said Gaetano Lucchese as having been illegally and fraudulently procured."

* * * *

tions on the ground that the decision in *Zucca* supported each of the three grounds for dismissal that he had previously presented. Judge Inch held that *Zucca* required the affidavit to be filed with the complaint and, reversing his prior rulings, dismissed the complaint.

Whether the affidavit must be filed with the complaint was one of the issues before this court in *United States* v. *Matles, supra,* in which it was held that the affidavit can be filed after the complaint and that *United States* v. *Zucca, supra,* does not require otherwise. Hence, on the authority of *United States* v. *Matles,* we reject the defendant's reading of *Zucca.*

For the reasons stated in the *Matles* decision, we also reject defendant's contention that the affidavit of good cause must be made by someone with personal knowledge of the facts sworn to. See also *United States* v. *Costello,* 142 F. Supp. 290 (S. D. N. Y. 1956).

Lucchese further contends that the good cause affidavit is inadequate because it does not contain evidentiary facts in support of the complaint but merely the conclusory statements that defendant fraudulently procured citizenship by misrepresentations as to his name, identity and criminal record, and that because of these misrepresentations he did not satisfy the good moral character requirements.

Examination of the affidavit discloses that it contained more than these conclusory statements which, by themselves, would certainly be insufficient. These conclusions [fol. 24] were prefaced by an incorporation by reference of the complaint, in these words:

> "• • • as more fully appears from the attached complaint of the United States v. Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization. • • • "

As noted, the complaint contained detailed allegations setting forth many evidentiary matters,[3] and, if incorporated, would bring the affidavit up to the standard which *Zucca* seems to have established, 351 U. S. at 99.

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[3] See note 2 *supra.*

Lucchese claims, however, that this attempted incorporation by reference is ineffective, for no complaint was attached to the affidavit and he therefore could not know that the complaint herein was intended. This contention is frivolous. The record discloses only one denaturalization complaint outstanding against Lucchese, and that was dated the same day as the affidavit, although as we have stated, the affidavit was not filed until much later. It is inconceivable that Lucchese or anyone else who had read and had possession of the original complaint could be at all uncertain as to which complaint was referred to.

Lucchese also seems to contend that under § 338(a) the action must be based "*upon* [an] affidavit showing good cause therefor," and that this action was not, but upon records in the Immigration and Naturalization Service and the Federal Bureau of Investigation. He seems to interpret the word "upon" to mean that the affidavit must be the source of the information on which the government bases its action. The affidavit must therefore be in existence prior to the initiation of the action and, he contends, that was not true here, for whatever complaint was re- [fol. 25] ferred to in this affidavit the latter was drawn up after that complaint.

In support of his argument that the action was not based upon the affidavit herein, Lucchese points to these factors: (1) verification in the complaint does not refer to the affidavit as the source of information but rather to "correspondence, papers and reports"; (2) the affidavit does not itself state the evidentiary matter but refers to the complaint, and this, he contends, necessarily implies that the affidavit was drawn up after the complaint and that the action could not have been based on the affidavit.

While agreeing with Lucchese's interpretation of the statutory use of "upon," see *United States* v. *Zucca*, 351 U. S. at 100, we do not agree that the statute was not complied with.

As to the first point, "correspondence, papers and reports" are words sufficiently broad and comprehensive to include an affidavit. Secondly, we are not persuaded that the affidavit was not drawn up until after the complaint was filed, simply because the affidavit incorporates

the allegations of the complaint. The use of this shorthand device indicates only that the two documents were drawn up at about the same time. It does not imply that the affidavit was drawn up after the complaint was filed. On the contrary, it would seem that here the affidavit and complaint were drawn up at about the same time, and were completed by November 17, 1952 when the complaint was filed. Apparently it was not the practice to file the affidavit with the complaint and so the affidavit was kept in the files of the United States Attorney. But regardless of whether the affidavit was filed with the complaint or later, see *United States* v. *Matles, supra,* suit was commenced only after an affidavit of good cause had been executed, and that constitutes full compliance with the [fol. 26] statutory requirement of § 338(a) that the suit be based upon the affidavit.

In § 338(a) Congress sought to guard against the misadventure that suits with such serious possible consequences to naturalized citizens might be commenced without a careful preliminary study and a finding simultaneous with the filing of the suit that there was good cause for its commencement. In this case the date and contents of the affidavit show that the defendant has enjoyed the protection which Congress intended he should have. The motion to dismiss the complaint should have been denied.

Accordingly we reverse the order of the District Court.

STEWART, *Circuit Judge,* concurring:

In view of *United States v. Zucca,* 351 U. S. 91, the district court held that a denaturalization proceeding could not be maintained when the affidavit of good cause was filed subsequent to the complaint. My independent view is that the district court was correct.

The concluding words of the prevailing opinion in *Zucca* seem to me unambiguous: "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this dan-

ger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a *preliminary showing* of good cause. Such a safeguard must not be lightly regarded. We believe that, not only in some cases but in all cases, the District Attorney must, as a *prerequisite to the initiation* of such proceedings, file an affidavit showing good cause." [Emphasis added] 351 U. S. 99-100.

[fol. 27] I agree with my brethren, however, that the law of this circuit is now otherwise. For that reason alone I concur. While a distinction could be made between this case and *United States* v. *Matles*, —— F. (2d) ——, June 10, 1957, in that an amended complaint was filed there, the basic issue is substantially the same in both cases.

[fol. 28] IN UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

• • • •

Present: Hon. Carroll C. Hincks
Hon. Potter Stewart
Hon. J. Edward Lumbard
Circuit Judges.

United States, plaintiff-appellant

vs

Gaetano Lucchese, defendant-appellee

Judgment—June 17, 1957

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. Daniel Fusaro,
Clerk

[fol. 28A] (File Endorsement Omitted)

[fol. 29] SUPREME COURT OF THE UNITED STATES

No. 450, October Term, 1957.

13052

GAETANO LUCCHESE, PETITIONER

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Second Circuit, and was duly submitted.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said United States Court of Appeals, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of New York with direction to dismiss the complaint. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca*, 351 U.S. 91, 99-100.

April 7, 1958

A true copy

(SEAL) John T. Fey,

Test:
Clerk of Supreme Court of the United States
Certified this Ninth day of May 1958

By

Deputy

[fol. 30] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT

JUDGMENT ENTERED ON REMAND, DISMISSING THE COMPLAINT—July 16, 1959

At Brooklyn, New York, in said District, on the 16th day of July 1959.

Plaintiff having appealed to the United States Court of Appeals for the Second Circuit from an Order of this Court dated and entered on October 15th, 1956, dismissing the Complaint herein without prejudice to plaintiff's right to institute a proceeding to denaturalize defendant upon the filing of an Affidavit showing good cause therefor, and that Court having reversed said Order by Judgment dated and entered on June 17th, 1957, and defendant having thereafter petitioned the Supreme Court of the United States for a Writ of Certiorari, and that Court having granted same and then rendered Judgment on April 7th, 1958, and a certified copy of said Judgment having been duly filed by the Clerk of this Court on May 12th, 1958,

Now, on motion of Richard J. Burke, attorney for the defendant, it is

[fol. 31] ORDERED, ADJUDGED AND DECREED that said Judgment of the Supreme Court of the United States be, and the same hereby is made the Judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the Complaint herein be, and the same hereby is dismissed without costs to either party.

/s/ Robert Inch
United States District Judge

• • • •

[fol. 31A] (File Endorsement Omitted)

[fol. 32] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT

NOTICE OF AND MOTION FOR RESETTLEMENT OF THE JUDGMENT—Filed July 20, 1959

SIR:

PLEASE TAKE NOTICE that upon the annexed Affidavit of IRWIN J. HARRISON, Assistant United States Attorney for the Eastern District of New York, duly sworn to the 16th day of July 1959, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court, at a Term for Motions to be held before the Honorable ROBERT A. INCH, United States District Judge, in Room 312, at the United States Court House, 271 Washington Street, Borough of Brooklyn, City and State of New York, on the 24th day of July 1959, at 10:30 a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard, for resettlement of the

Order on Judgment signed and entered on July 16th, 1959, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York, July 16th, 1959.

Yours, etc.,

CORNELIUS W. WICKERSHAM, JR.,
United States Attorney,
Eastern District of New York,
Attorney for Plaintiff,
271 Washington Street,
Brooklyn 1, New York.

By: /s/ Irwin J. Harrison,
IRWIN J. HARRISON,
Assistant United States Attorney.

To:

RICHARD J. BURKE, ESQ.,
Attorney for Defendant,
60 Wall Street,
New York 5, New York.

[fol. 33] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

* * * *

AFFIDAVIT OF IRWIN J. HARRISON

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

IRWIN J. HARRISON, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such, and am familiar with and in charge of this proceeding.

This Affidavit is submitted in support of plaintiff's motion for resettlement of the Order on Judgment signed and entered herein on July 16th, 1959.

On July 16th, 1959, both plaintiff and defendant submitted proposed Orders on Judgment.

The essential difference between these two proposed Orders on Judgment was that plaintiff's proposed Order provided for dismissal of the Complaint herein without prejudice, whereas, defendant's proposed Order merely provided for dismissal.

No briefs were filed by plaintiff with its proposed Order inasmuch as a hearing to determine whether the Court should sign the proposed Order on Judgment of plaintiff, or that of defendant, was requested by plaintiff [fol. 34] by Notice of Request for Hearing dated July 15th, 1959, and Affidavit of IRWIN J. HARRISON, Assistant United States Attorney, duly sworn to that same day, both of which were filed with the Clerk of this Court on July 16th, 1959 at 10:00 a.m., at which hearing plaintiff expected to explain to the Court the significance of the difference between the two Orders, and the reasons for signing plaintiff's Order.

On July 16th, 1959, without disposing of plaintiff's request for such a hearing, this Court signed the Order on Judgment submitted by defendant.

WHEREFORE, I respectfully request:

1. That the Order on Judgment signed and entered on July 16th, 1959 be resettled;
2. That a hearing, as described above, be scheduled by this Court for August 7th, 1959; and
3. Such other and further relief as to this Court may seem just and proper.

/s/ Irwin J. Harrison

Sworn to before me this 16th day of July 1959.

/s/ Peter A. Passalacqua
PETER A. PASSALACQUA

Notary Public, State of New York, No. 24-3028600. Qualified in Kings County. Cert. filed with Kings & Queens Co. Reg. Commission Expires March 30, 1961.

[fol. 34A] AFFIDAVIT OF MAILING
(Omitted in printing)

[fol. 34B] (File Endorsement Omitted)

[fol. 35] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

C-13052

UNITED STATES OF AMERICA

v.

GAETANO LUCCHESE

Brooklyn, New York

HEARING ON MOTION FOR RESETTLEMENT—July 24, 1959

Before: HONORABLE ROBERT A. INCH., U.S.D.J.

APPEARANCES:

CORNELIUS W. WICKERSHAM, Jr., Esq.,
United States Attorney for the
Eastern District of New York

BY: IRWIN J. HARRISON, Esq.
Assistant United States Attorney
Of Counsel

RICHARD J. BURKE, Esq.
Attorney for Defendant
60 Wall Street
New York, New York

Motion for resettlement of the Order of Judgment signed and entered on July 16, 1959, etc.

[fol. 36] MR. HARRISON: Before I proceed into the factual matter of the Government's motion to resettle the Order, I want to have one question clarified, and that is, in signing the proposed Order on Judgment submitted by the Defendant, which provided merely for dismissal, were you exactly and expressly merely following the language

of the Supreme Court's judgment, and not in any way passing upon the question of whether this was a dismissal with or without prejudice?

THE COURT: I follow the Supreme Court's decision—it is plain enough. They directed the complaint be dismissed.

MR. HARRISON: What I meant, you weren't in any way passing upon the question that this dismissal constituted a bar to subsequent action.

THE COURT: My original order said without prejudice, and you took advantage of that properly.

It went to the Court of Appeals and you argued it all out. Then you went from them to the Supreme Court of the United States. The Supreme Court of the United States makes the final decision.

There isn't anything for me to do except sign an order dismissing the complaint. We have been fooling around with this thing for sometime.

[fol. 37] I intend to follow the Supreme Court of the United States, which is a plain decision, that the complaint should be dismissed. That is all it is.

MR. HARRISON: You were going no further than that.

THE COURT: That is what I intend to do. I needn't fool around with proposed order and all that kind of thing, and take time. It is a simple thing. That is what I shall do.

Your motion is denied.

Have you anything to say, Mr. Burke?

MR. BURKE: Not after what your Honor just said. I don't think I can anything to it.

THE COURT: I shall make an order before I leave on my vacation, an order dismissing the complaint. You needn't bother about a proposed order. I will make the order.

* * * *

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 38] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civ-13052

UNITED STATES OF AMERICA

- vs -

GAETANO LUCCHESE, etc.

Before: INCH, J.

Motion for resettlement of the Order of Judgment signed and entered on July 16th, 1959, etc.

Appearances: Cornelius W. Wickersham, Jr., U.S. Attorney, Attorney for Plaintiff, by Irwin J. Harrison, Asst. U.S. Attorney.

Richard J. Burke, Attorney for Defendant.

Motion Argued & Denied

ORDER DENYING MOTION FOR RESETTLEMENT—July 24, 1959

After hearing oral argument by counsel for both parties and reading all the papers, it is hereby ordered that plaintiff's motion to resettle the order on judgment, signed and entered July 16, 1959, be and the same is hereby denied, in all respects.

Enter,

/s/ Robert Inch
U.S.D.J.

[fol. 39] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESE, also known as THOMASE LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT

NOTICE OF APPEAL—Filed September 11, 1959

SIR:

PLEASE TAKE NOTICE that the UNITED STATES OF AMERICA, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order on Judgment signed by United States District Judge ROBERT A. INCH on the 16th day of July 1959, as provides for mere dismissal of the Complaint herein, and fails to specify that said dismissal is without prejudice; and

PLEASE TAKE FURTHER NOTICE that plaintiff hereby also appeals to the aforesaid Court of Appeals from the Order signed by United States District Judge ROBERT A. INCH on the 24th day of July 1959, and entered on that date, denying plaintiff's motion to resettle the aforesaid Order on Judgment, and from each and every part thereof.

Dated: Brooklyn, New York, September 11th, 1959.

Yours, etc.,

CORNELIUS W. WICKERSHAM, JR.,
United States Attorney,
Eastern District of New York,
Attorney for Plaintiff,
271 Washington Street,
Brooklyn 1, New York.

By:

/s/ Irwin J. Harrison,
Assistant United States Attorney.

To:

CLERK,
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.
RICHARD J. BURKE, ESQ., Attorney for Defendant,
60 Wall Street, New York 5, New York.

[fol. 39A] AFFIDAVIT OF MAILING
(Omitted in printing)

[fol. 39B] (File Endorsement Omitted)

[fol. 40] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

- against -

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, APPELLEE

NOTICE OF AND MOTION TO DISMISS APPEAL—
Filed October 15, 1959

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of RICHARD J. BURKE sworn to the 8th day of October, 1959 and the exhibits annexed thereto, a motion will be made before this Court by the undersigned at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 13th day of October, 1959 at 10:30 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal herein on the ground that this Court lacks jurisdiction thereof.

Dated, New York, October 8th, 1959.

Yours, etc.,

RICHARD J. BURKE
Attorney for Appellee

To:

HON. CORNELIUS W. WICKERSHAM, JR., ESQ.
United States Attorney for the
Eastern District of New York
United States Courthouse
271 Washington Street
Brooklyn 1, N. Y.

[fol. 41] UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

• • • •

AFFIDAVIT OF RICHARD J. BURKE

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

RICHARD J. BURKE being duly sworn, deposes and says: I am the attorney for the above named appellee, and I make this affidavit in support of a motion to dismiss the appeal herein on the ground that this Court lacks jurisdiction thereof.

The Supreme Court of the United States in its opinion herein reported at 356 U.S. 256, granting a petition for a writ of certiorari and reversing the judgment of this Court, on April 7, 1958, remanded the case to the District Court "with directions to dismiss the complaints."

A copy of that judgment of the Supreme Court now on file in the office of the Clerk of the District Court for the Eastern District of New York, certified by the Clerk of the Supreme Court of the United States as of May 9, [fol. 42] 1958, is annexed hereto marked Exhibit A. On July 16, 1959 the United States Attorney submitted for signature to the United States District Court a proposed "Order on Judgment" providing for the dismissal of the complaint "without prejudice". On the same day deponent submitted a proposed "Order on Judgment" which was identical with the Government's proposed order except that it omitted the words "without prejudice." This latter order was the one signed by the District Judge, and a copy is annexed hereto marked Exhibit B.

The Government moved before the District Court on July 24, 1959 to resettle the Order on Judgment so as to include the words "without prejudice", and that motion was argued and denied.

On September 11, 1959 the Government appealed to this Court from so much of the Order on Judgment as failed to specify that the dismissal was "without prejudice" and also from the denial of its motion to resettle that order.

The Government has moved before this Court for an enlargement of time in connection with that appeal, and deponent has submitted an affidavit in opposition thereunto, annexed to which is a copy of the Government's notice of appeal, to which the Court is respectfully referred, since both motions are being heard at the same time.

The Supreme Court not having included the words "without prejudice" in its opinion and judgment, the District Court has also refrained from using such language in its order entered in compliance with the Su-
[fol. 43] preme Court mandate. The present appeal therefore concerns itself solely with the question of whether the District Court has properly construed and obeyed the mandate of the Supreme Court. It is well settled, as the cases cited in the memorandum submitted herewith demonstrate, that that question is not within the jurisdiction of this Court. It is for the Supreme Court alone to construe and enforce its mandate. Therefore this appeal should be dismissed.

Sworn to before me this 8th day of October, 1959.

RICHARD J. BURKE

RUTH FLAX, Notary Public, State of New York, No. 03-6331000. Qualified in Bronx County. Commission Expires March 30, 1960.

[fol. 44] (File Endorsement Omitted)

• • • •

IN UNITED STATES COURT OF APPEALS

OPINION—October 15, 1959

Appellee's motion to dismiss the appeal is granted. Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

/s/ C. E. Clark, U.S.C.J.
/s/ J. J. Smith, U.S.D.J.

October 15, 1959

[fol. 45] IN UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT

* * * *

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT-APPELLEE

Present: HON. CHARLES E. CLARK,
Chief Judge.

HON. J. JOSEPH SMITH,
District Judge.

JUDGMENT—October 15, 1959

A motion having been made herein by counsel for the appellee to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the appeal from the order of the United States District Court for the Eastern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk

[fol. 45A] (File Endorsement Omitted)

[fol. 46] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA, APPELLANT

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, APPELLEE

NOTICE OF AND MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING AND OTHER AND FURTHER RELIEF—Filed March 11, 1960

SIR:

PLEASE TAKE NOTICE that upon the annexed Affidavit of MARGARET E. MILLUS, Assistant United States Attorney for the Eastern District of New York, sworn to the 3rd day of March, 1960, appellant will move this Court by submission only on March 8, 1960 for an order permitting appellant to file a petition for rehearing of a motion to dismiss an appeal and on rehearing to deny the motion and permit the Government to file the record and docket the appeal in question, as further described herein.

No appearance or submission by counsel for appellee is necessary.

Dated: Brooklyn, New York
March 3, 1960

Yours, etc.
CORNELIUS W. WICKERSHAM, Jr.
United States Attorney,
Eastern District of New York,
Attorney for Appellee,
271 Washington Street
Brooklyn 1, New York

By:
/s/ Margaret E. Millus,
Assistant United States Attorney

To:

RICHARD J. BURKE, ESQ.
Attorney for Appellee
60 Wall Street
New York 5, N. Y.

[fol. 47] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

AFFIDAVIT OF MARGARET E. MILLUS

COUNTY OF KINGS)
STATE OF NEW YORK) SS:

MARGARET E. MILLUS, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such, and am familiar with and in charge of this proceeding.

This affidavit is submitted in support of a motion for an order permitting appellant to file a petition for rehearing.

On April 7, 1958 the Supreme Court of the United States, in granting petitions for Writs of Certiorari, in *Costello* v. *United States* and the instant case in the same opinion, reversed the judgments of this Court in said cases and remanded the cases to the District Courts for the Southern and Eastern Districts of New York, respectively, with directions "to dismiss the complaints" (356 U.S. 256, 257).

The ground for such reversal and remand was that "an affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings."

On May 1, 1958 the United States Attorney for the Southern District of New York instituted a new denaturalization proceeding against Costello and an affidavit of good cause was filed contemporaneously with the complaint.

Shortly thereafter, United States District Judge John F. X. McGohey signed an Order on Judgment in the first [fol. 48] *Costello* case which provided only "that plaintiff's complaint be and the same hereby is dismissed" and did not specify that such dismissal was without prejudice.

The United States took no appeal from that order of dismissal.

Meanwhile on July 16, 1959 the United States Attorney for the Eastern District of New York submitted for signature a proposed "Order on Judgment" in the instant case providing for the dismissal of the complaint "without prejudice." On the same day counsel for Lucchese submitted a proposed "Order on Judgment" which was identical with the Government's proposed order except that it omitted the words "without prejudice." This latter order was the one signed by the District Judge.

On July 24, 1959 the Government moved to resettle the Order on Judgment to include the words "without prejudice" and that motion was argued and denied.

On September 11, 1959 the Government appealed to this Court from so much of the Order on Judgment as failed to provide that the dismissal was "without prejudice" and also from the denial of its motion to resettle that order.

Thereafter the Government requested this Court to extend its time to file the record and docket its appeal until forty (40) days after the Court's decision on the appeal in *United States* v. *Costello* which had been tried in the United States District Court for the Southern District of New York, and a decision rendered for the Government on February 20, 1959, or, in the event of a petition for certiorari, until forty (40) days after the decision of the Supreme Court. This Court, however, on motion of appellee, dismissed the Government's appeal in the instant case on October 15, 1959 and stated:

> "* * * there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment."

On February 17, 1960 this Court affirmed the denaturalization of *Costello*. Although Costello had argued that [fol. 49] the complaint was barred under principles of res judicata since there had not been a dismissal of the complaint "without prejudice," this Court pointed out that "there is nothing to the point" and stated: (p. 813)

> "There may have been an error by the district court in its refusal to add the words, proposed by the Government, that the dismissal of the complaint

should be 'without prejudice'. However, *this error, if it was an error, could have been corrected on appeal,* and no appeal was taken from the district court's order of dismissal." (emphasis added)

In view of the foregoing holding in the *Costello* case the Government requests this Court to grant the instant motion to permit it to file a petition to rehear the motion to dismiss the appeal, and on rehearing to deny the motion and permit the Government to file the record and docket its appeal from the Order on Judgment signed by United States District Judge Robert A. Inch on the 16th day of July 1959, as provides for mere dismissal of the complaint and fails to specify that said dismissal is without prejudice.

/s/ Margaret E. Millus
MARGARET E. MILLUS
Assistant U.S. Attorney

Sworn to before me this 3rd day of March 1960.

/s/
Notary Public

PETER A. PASSALACQUA, Notary Public, State of New York, No. 24-3028600. Qualified in Kings County. Cert. filed with Kings & Queens Co. Reg. Commission Expires March 30, 1961.

[fol. 50] (File Endorsement Omitted)

• • • •

MOTION DENIED.

/s/ C. E. Clark,
U.S.C.J.

/s/ J. J. Smith,
U.S.D.J.

March 11, 1960

[fol. 51] IN UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT

• • • •

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT-APPELLEE

Present: HON. CHARLES E. CLARK,
Circuit Judge.

HON. J. JOSEPH SMITH,
District Judge.

ORDER DENYING MOTION FOR REHEARING—March 11, 1960

A motion having been made herein by counsel for the appellant for leave to file a petition for rehearing and other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

[fol. 51A] (File Endorsement Omitted)

[fol. 52] UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

• • • •

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES

(Title Omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 12, 1960

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 14th, 1960.

/s/ John Marshall Harlan
Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1960.

[fol. 54] SUPREME COURT OF THE UNITED STATES

No. 789, October Term, 1959

UNITED STATES, PETITIONER

vs.

GAETANO LUCCHESE, ETC.

ORDER ALLOWING CERTIORARI—May 16, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The motion to amend the petition for certiorari in No. 802 is assigned for hearing and consolidated with the argument on the merits in this case and a total of one hour is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 560855 159

FILE COPY

No. — 789 57

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ABBA, ALSO KNOWN AS THOMAS LUCHESE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. ——

UNITED STATES OF AMERICA, PETITIONER

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit (Appendix A, *infra*), dismissing the appeal by the United States from so much of the Order on Judgment of the United States District Court for the Eastern District of New York (Inch, *D.J.*), entered July 16, 1959, as provided for mere dismissal of the denaturalization complaint and failed to specify that the dismissal was without prejudice (Appendix B, *infra*), and from Judge Inch's order of July 24, 1959, denying the motion of the United States to resettle the Order on Judgment (Appendix C, *infra*).

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (Appendix A, *infra*) is not reported. The Order on Judgment of the District Court (Appendix B, *infra*) and the order of the District Court denying the motion of the United States to resettle the Order on Judgment (Appendix C, *infra*) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered October 15, 1959 (Appendix A, *infra*). On January 12, 1960, Mr. Justice Harlan entered an order extending the time for filing a petition for a writ of certiorari to and including March 14, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government is entitled to have the order of dismissal of the denaturalization complaint, which this Court directed in *Lucchese* v. *United States,* 356 U.S. 256, specify that the dismissal is without prejudice to the filing of a new complaint.

RULE INVOLVED

Rule 41(b) of the Federal Rules of Civil Procedure provides:

RULE 41.—DISMISSAL OF ACTIONS

* * * * *

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his

evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). *Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.* [Italics added.]

STATEMENT

On November 17, 1952, a denaturalization complaint was filed against respondent in the United States District Court for the Eastern District of New York. In accordance with the then current practice, the "good cause" affidavit required by the pertinent statute (now 8 U.S.C. 1451(a)) was not filed with the complaint. On respondent's motion to dismiss, a conditional dismissal order was entered, conditioned on failure to file the affidavit within fifteen days. The affidavit was filed. On reargument following *United States* v. *Zucca*, 351 U.S. 91,[1] and before trial, the District

[1] In that case this Court held the filing of the affidavit of good cause to be a prerequisite to the initiation of a denaturalization proceeding.

Court dismissed the complaint for failure to file the affidavit with the complaint, "without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon the filing of the required affidavit." 149 F. Supp. 952. On appeal by the government, the Court of Appeals for the Second Circuit reversed, holding that the dismissal motion should have been denied. *United States* v. *Lucchese*, 247 F. 2d 123. On April 7, 1958, this Court reversed the judgment of the court of appeals and ordered the case "remanded to the District Court with directions to dismiss" the complaint. *Lucchese* v. *United States*, [together with *Matles* v. *United States* and *Costello* v. *United States*], 356 U.S. 256, 257.[2]

Upon remand pursuant to this Court's judgment, the government submitted to the District Court a proposed form of order dismissing the complaint "without prejudice." The District Court (Inch, *D.J.*) rejected this form and, instead, on July 16, 1959, entered an order of dismissal which did not specify whether it was with or without prejudice (Appendix B, *infra*). The government moved for resettlement of the dismissal order. At the argument of the motion, government counsel sought to ascertain from the District

[2] The Court's *per curiam* order read in pertinent part (356 U.S. at 257): "In Nos. 450 [*Lucchese*] and 494 [*Costello*] the judgments of the Court of Appeals for the Second Circuit are reversed and the cases are remanded to the District Court with directions to dismiss the complaints. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca*, 351 U.S. 91, 99–100."

Court whether in entering the order the court was in any way passing on the question of whether the dismissal constituted a bar to subsequent action by the government looking to the denaturalization of respondent. The District Court responded that it was going no further than to follow this Court's direction that the complaint be dismissed. The motion for resettlement was denied on July 24, 1959 (Appendix C, *infra*).

The government appealed to the Court of Appeals for the Second Circuit from so much of the order of dismissal as provided for mere dismissal of the denaturalization complaint and failed to specify that the dismissal was without prejudice, and from the order, *supra*, denying the motion for resettlement of the order of dismissal. On October 15, 1959, the Court of Appeals, on respondent's motion, dismissed the government's appeal (Appendix A, *infra*). The *per curiam* order dismissing the appeal said (*ibid.*):

> Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

REASONS FOR GRANTING THE WRIT

1. The District Court erred in considering itself precluded by the mandate of this Court in *Lucchese* v. *United States*, *supra*, 356 U.S. 256, from specifically directing that the order of dismissal of the denaturalization complaint (which that mandate directed)

should be "without prejudice" to the right of the government to file a new complaint. It is clear that this Court did not intend its *Lucchese* decision to bar the government from filing a new denaturalization complaint which would meet the requirements of that decision and *United States* v. *Zucca, supra,* 351 U.S. 91. An appellate court's mandate, while of course binding on a lower court as to all matters encompassed therein, leaves the lower court free as to any issue within its jurisdiction which was not settled by the higher court's decision. *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 168; *In re Sanford Ford & Tool Co.,* 160 U.S. 247, 255–256; *Christoffel* v. *United States,* 214 F. 2d 265 (C.A.D.C.), certiorari denied, 348 U.S. 850.

Since the District Court was free to include a "without prejudice" proviso in the order of dismissal, the government was entitled to the protection of such a provision. Under Rule 41(b) of the Federal Rules of Civil Procedure (*supra*), any involuntary dismissal, "other than a dismissal for lack of jurisdiction or for improper venue", "operates as an adjudication upon the merits", "[u]nless the court in its order for dismissal otherwise specifies". The dismissal directed by this Court was clearly not for lack of venue. With respect to the question whether it was for lack of "jurisdiction" within the meaning of Rule 41(b), the court below observed in *United States* v. *Costello,* decided February 17, 1960,[3] "the word 'jurisdiction' is a somewhat slippery one, susceptible

[3] This opinion, which has not yet been reported, appears as Appendix D, *infra.*

of various meanings" (Appendix D, *infra*, 5th paragraph from the end).[4] This being so, the only way in which the government can fully protect its right to file a new denaturalization complaint against respondent which will satisfy the rule of the *Zucca* case is to have the dismissal order provide that it is "without prejudice" to the right to institute such a proceeding.

2. Following this Court's decision in *Costello* v. *United States*, 356 U.S. 256 (a companion case to this case, see *supra*), the District Court in that case (the District Court for the Southern District of New York), like the District Court in this case, apparently considering itself bound by the terms of this Court's mandate to dismiss the denaturalization complaint without qualifying language, rejected a government proposal (similar to the proposal made in this case) that the order of dismissal state that it was "without prejudice", and entered an order of dismissal which did not specify whether it was with or without prejudice. In that case, unlike this one, the government did not appeal from the refusal to include a "without prejudice" clause. The government meanwhile had

[4] In *Title* v. *United States*, 263 F. 2d 28 (C.A. 9), certiorari denied, 359 U.S. 989, the court construed this Court's decision in *United States* v. *Zucca*, *supra*, 351 U.S. 91, as holding the filing of an affidavit of good cause to be a procedural but not a jurisdictional prerequisite to the institution of a denaturalization proceeding. It accordingly refused to permit a denaturalization decree, an appeal from which had been permitted to lapse, to be thereafter collaterally attacked as void for lack of jurisdiction on the ground that a good-cause affidavit had not been filed with the denaturalization complaint.

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filed in the District Court a new denaturalization complaint against Costello, accompanied by a contemporaneously filed affidavit of good cause. The District Court in that new suit, as against a defense claim that the dismissal of the prior proceeding was a bar to the new action, upheld the government's right to file the new complaint, and entered a new denaturalization decree. *United States* v. *Costello,* 171 F. Supp. 10.[5] This decision was affirmed by a different division of the court below on February 17, 1960. (The Court of Appeals' opinion, which is not yet reported, appears as Appendix D, *infra;* the portion pertinent to the present issue appears in approximately the last third of the opinion.)

"It seems to us," the Second Circuit there held, "that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare 'dismissal' is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure

[5] The portion of the opinion pertinent to the claim of *res judicata* appears at pp. 21–23.

technicalities to a wholly unwarranted degree" (Appendix D, *infra*, penultimate paragraph).

We, of course, agree with these views, and if we could be certain that they correctly state the law there would be no need for this petition for a writ of certiorari. Since it is possible, however, that this Court (in the event of the filing by Costello, and the granting of a petition for certiorari to review the Second Circuit's judgment) will adopt a different construction of Rule 41(b)—and hold that a "without prejudice" provision in the order of dismissal is required to prevent the dismissal from operating as a *res judicata* bar—it is necessary for the government to file this petition to protect its right to proceed against this respondent in a new proceeding in the event of such a construction of Rule 41(b) by this Court. It is suggested, therefore, that this petition might appropriately be held in abeyance pending the possible filing by Costello of a petition for certiorari challenging the aspect of the Second Circuit's decision, above discussed, which is pertinent to this case. If such a petition should be filed, and if this Court should grant it, it would, we think, be appropriate for the Court simultaneously to grant this petition and to set the cases for argument together. If, on the other hand, Costello does not file a petition for certiorari raising the *res judicata* issue (or if he files such a petition and it is denied as to this point), we would withdraw this present petition.*

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*The division of the court below which decided the *Costello* case said in its opinion in that case: "There may have been an error by the district court in its refusal to add the words,

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted, conditioned upon the filing, and the granting by this Court, of a petition for certiorari challenging the *res judicata* aspect of the Second Circuit's decision of February 17, 1960, in the *Costello* case.

J. LEE RANKIN,
Solicitor General.

MARCH 1960.

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proposed by the government, that the dismissal of the complaint should be 'without prejudice'. However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken * * *" (Appendix D, *infra*, 9th paragraph from the end). Because this language seemed inconsistent with the action of the division of the court which decided this case in dismissing the government's appeal from the refusal of the District Court to include a "without prejudice" clause, the government moved the Court of Appeals for leave to file an untimely petition for rehearing of the dismissal of its appeal in this case, on the basis of the above-quoted language from the *Costello* opinion. This motion was denied on March 11, 1960 without opinion.

APPENDIX A

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE, APPELLEE

Appellee's motion to dismiss the appeal is granted. Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

C. E. C., *U.S.C.J.*
J. J. S., *U.S.D.J.*

OCTOBER 15, 1959.

APPENDIX B

In the United States District Court for the Eastern District of New York

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

against

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE, DEFENDANT

ORDER ON JUDGMENT

At Brooklyn, New York, in said District, on the 16th day of July 1959.

Plaintiff having appealed to the United States Court of Appeals for the Second Circuit from an Order of this Court dated and entered on October 15th, 1956, dismissing the Complaint herein without prejudice to plaintiff's right to institute a proceeding to denaturalize defendant upon the filing of an Affidavit showing good cause therefor, and that Court having reversed said Order by Judgment dated and entered on June 17th, 1957, and defendant having thereafter petitioned the Supreme Court of the United States for a Writ of Certiorari, and that Court having granted same and then rendered Judgment on April 7th, 1958, and a certified copy of said Judgment having been duly filed by the Clerk of this Court on May 12th, 1958,

Now, on motion of Richard J. Burke, attorney for the defendant, it is

ORDERED, ADJUDGED AND DECREED that said Judgment of the Supreme Court of the United States be, and the same hereby is made the Judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the Complaint herein be, and the same hereby is dismissed without costs to either party.

ROBERT A. INCH,
United States District Judge.

APPENDIX C

Civil 13052

UNITED STATES OF AMERICA

v.

GEATANO LUCCHESE, ETC.

Motion for resettlement of the Order on Judgment signed and entered on July 16, 1959, etc.

Appearances:

Cornelius W. Wickersham, Jr., United States Attorney, Attorney for Plaintiff, by Irwin J. Harrison, Assistant United States Attorney.

Richard J. Burke, Attorney for Defendant.

ORDER

After hearing oral argument by counsel for both parties and reading all the papers, it is hereby ordered that plaintiff's motion to resettle the Order on Judgment, signed and entered July 16, 1959, be and the same is hereby denied, in all respects.

Enter,

ROBERT A. INCH, *U.S.D.J.*

JULY 24, 1959.

APPENDIX D

In the United States Court of Appeals for the Second Circuit

No. 58—October Term, 1959.

(Argued November 17, 1959—Decided February 17, 1960)

Docket No. 25690

UNITED STATES OF AMERICA, APPELLEE

v.

FRANK COSTELLO, APPELLANT

Before MAGRUDER, MOORE and FRIENDLY, *Circuit Judges*

Appeal from a decree of the United States District Court for the Southern District of New York, Archie Owen Dawson, *Judge*, revoking citizenship, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), as amended, 68 Stat. 1232, on the ground that citizenship certificate was obtained by willful misrepresentations. 171 F. Supp. 10. *Affirmed.*

Edward Bennett Williams, Washington, D.C. (Agnes A. Neill and Vincent J. Fuller, Washington, D.C., Morris Shilensky, New York, N.Y., and Hays, St. John, Abramson & Heilbron, New York, N.Y., on the brief), *for appellant.*

Morton S. Robson, Asst. U.S. Atty., Southern District of New York, New York, N.Y. (S. Hazard Gillespie, Jr., U.S. Atty., S.D. N.Y., New York, N.Y., on the brief), *for appellee.*

MAGRUDER, *Circuit Judge:*

This is another of those troublesome denaturalization cases, instituted by the government in an effort to have the court cancel a certificate of naturalization issued over thirty years ago. The proceeding is brought pursuant to § 340(a) of the Immigration and Nationality Act of 1952, as amended, 68 Stat. 1232. This statute contains no provision for limitations, nor is there any other federal statute applicable to the case. And, as Hughes, *C.J.*, said in *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940): "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."

It is impossible to say that the statutory provisions for the issuance by the court of naturalization certificates, under certain prescribed conditions, do not constitute a proper judicial function. *Tutun* v. *United States*, 270 U.S. 568 (1926). And despite what may seem to be the harshness of the result, it seems impossible to say that the Congress cannot constitutionally provide a proceeding for the cancellation of a certificate obtained by fraud or concealment. *Knauer* v. *United States*, 328 U.S. 654, 673 (1946). It was so provided way back in the Act of 1906 which, in § 15 thereof, vested jurisdiction in the district courts of suits by the United States Attorney on behalf of the United States "for the purpose of setting aside and canceling a certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

34 Stat. 601. See *Johannessen* v. *United States*, 225 U.S. 227 (1912). Such provision for denaturalization was carried forward by Congress into § 338(a) of the Nationality Act of 1940 (54 Stat. 1158–59). In the Immigration and Nationality Act passed in 1952, denaturalization proceedings were also provided for, but the Congress struck out the earlier provision for cancellation of a certificate that had been illegally issued, and confined cancellation to cases where the certificate had been procured "by concealment of a material fact or by willful misrepresentation." 66 Stat. 260. This provision was reenacted by the Congress in 1954. 68 Stat. 1232.

The Supreme Court has never told us that a denaturalization proceeding partakes of the character of a criminal proceeding. Indeed, in the *Johannessen* case, *supra*, the Court upheld the constitutional validity of a provision in § 15 of the Act of 1906 to the effect that the denaturalization provisions should apply not only prospectively but also "to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws." 34 Stat. 601. In this connection the Court said (225 U.S. at 242): "It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. * * * The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges."

Although the Supreme Court has many times upheld a decree for the cancellation of a certificate of naturalization, it has prescribed an exacting quantum of proof as requisite to establishing a case by the government against a certificate holder. The case for

cancellation must be "clear, unequivocal, and convincing," and should not leave "the issue in doubt." See *Schneiderman* v. *United States*, 320 U.S. 118, 158 (1943); *Baumgartner* v. *United States*, 322 U.S. 665 (1944); *Knauer* v. *United States*, *supra*, 328 U.S. 654 (1946).

If a denaturalization case is a sort of civil proceeding, we are at a loss to see why our scope of review is not limited by the "clearly erroneous" test of the unqualified Rule 52(a) of the Federal Rules of Civil Procedure. If that is so, then once we are convinced that the district court was aware of and applied the proper strict standards of proof—which clearly appears in the case at bar—we ought not to upset its finding that the defendant had obtained his certificate of citizenship by fraud unless we are satisfied that such finding was "clearly erroneous." See *Corrado* v. *United States*, 227 F. 2d 780, 783 (C.A. 6th, 1955). Of course, fraud is an internal state of mind, and it is possible that a man may give an incorrect answer to a question in a bona fide but mistaken belief as to what the question calls for. But if an applicant for citizenship has in fact no such misapprehension as to what answer the question calls for, and consciously falsifies an answer on a material point, he is certainly guilty of fraud in the baldest sense of the term. The district court believed that Costello was guilty of this kind of fraud, and we certainly cannot say that the finding to this effect was "clearly erroneous."

On the other hand, perhaps we are wrong about our limited scope of review; and it may be that in this very special type of civil proceeding we have a broader power of review, and are under the obligation ourselves to scrutinize the evidence, to satisfy ourselves that the proof offered by the government was "clear, unequivocal, and convincing." See *Baumgartner v. United*

States, supra, 322 U.S. 665, 670–72 (1944); *Brenci* v. *United States,* 175 F. 2d 90 (C.A. 1st, 1949); *Cufari* v. *United States,* 217 F. 2d 404 (C.A. 1st, 1954).

Fortunately, we do not in this case have to determine what our scope of review may be in these cases, since we are here more than satisfied that the findings by the district court which will sustain a cancellation of the certificate of naturalization are the only findings possible on the evidence, and that they fulfill the strictest requirements of proof. 171 F. Supp. 10.

We think the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand and to introduce no evidence in answer to the government's case indicating fraud. The matters inquired into were within Costello's peculiar knowledge. Since Costello was not a criminal defendant in the present proceedings, he had no privilege to remain silent. *United States* v. *Matles,* 247 F. 2d 378 (C.A. 2d, 1957), rev'd on other grounds 356 U.S. 256 (1958). See also *Vajtauer* v. *Commissioner,* 273 U.S. 103 (1927).

The government's complaint in the present case was filed May 1, 1958. In compliance with the procedural requirement of § 340(a), as amended, the complaint was accompanied by affidavits showing "good cause" for the institution of the proceeding. 68 Stat. 1232. The request for cancellation of the certificate of naturalization was based upon various allegations of fraud and concealment. We mean to be guided by the words of the Supreme Court in the *Schneiderman* case, *supra,* 320 U.S. at 160: "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be

limited, as in a criminal proceeding, to the matters charged in its complaint."

Some of the allegations of fact contained in the complaint were not accepted by the district court as sufficiently established pursuant to the strict requirements of proof imposed upon the government. Though the government now urges us to examine the state of the evidence in these regards, we do not propose to go beyond the findings of fact by the district court. That court based its decree upon findings with reference to two of the issues raised by the complaint: (1) That in the preliminary form for petition for naturalization, and in testimony under oath before a naturalization examiner, and also in his petition for naturalization, Costello knowingly and willfully stated that his occupation was "real estate," whereas in truth his occupation was the illicit purchase and sale of alcoholic beverages; (2) that the defendant swore in his oath of allegiance, on September 10, 1925, that "I will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same." This was said to be a known falsehood because the defendant was actually engaged at the time in a course of activity which flouted the Constitution and was designed to violate the laws of the United States.

It was established by the United States, from Costello's own mouth, that he was at the crucial dates engaged in bootlegging activities. He gave a statement to Special Agent Sullivan on July 24, 1938, to the effect that he was involved in the liquor business from 1923 or 1924 until a year or two before repeal of the Eighteenth Amendment. In answer to questions by the district attorney in a proceeding before a New York County grand jury in 1943, Costello admitted that he got large sums of money from import-

ing whisky during prohibition days. He admitted that he had reported to the state taxing authorities that for the years 1919 to 1932 his income had totaled $305,000, most of it made in the bootlegging business. If corroboration of these statements is required in the present case, such corroboration is amply found in the testimony of the witnesses Kessler, Kelly and Coffey. The evidence is clear beyond any doubt that during prohibition days Costello's major activity, both in terms of time spent and revenue obtained, was bootlegging.

In his preliminary form for petition for naturalization, in answer to a question requiring him to put down his "present occupation," he answered "real estate." He gave a similar answer in his petition for naturalization.

Of course one has to begin a new occupation at some point of time, and at the outset there necessarily is not a great deal of evidence as to such activity. The evidence relating to Costello's real estate dealings is at best scanty. The government made a check of the real estate records in four counties of Greater New York, which check revealed that Koslo Realty Co., Inc., was organized on December 1, 1924; that some time prior to May 1, 1925, Costello was associated with this corporation. Koslo Realty Co. purchased a piece of property and sold the same on June 22, 1925. Costello later became president of the corporation. How much activity Costello had to expend in this capacity does not appear, nor does it appear whether or not Koslo Realty Co. was engaged in other real estate transactions in other parts of the country not covered by the government's spot check. If there was any further evidence along this line, it would be peculiarly within the knowledge of Costello, and his

failure to produce evidence of such activity warrants the inference that there was none such.

We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but "dust in the eyes" to conceal his real occupation. As the district judge stated: "If a man in that situation had been honest when asked what his occupation was, would he have answered 'real estate'? If he had told the truth he probably would not have been naturalized, but this is no excuse for his using fraud and deceit to secure his naturalization." The term "occupation," the court said, "would commonly be understood to refer to income producing activity to which a person devotes the major portion of his time and from which he derives the greater portion of his income." 171 F. Supp. at 18. Surely it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some "legal occupation." There is no evidence in the record that Costello so believed. If he had given a truthful answer, it is probable that the court would not readily have accepted his assertion of being possessed of "good moral character," and he might not have received his certificate of naturalization. As the district court said: "When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaged in a willful misrepresentation in order to secure his naturalization certificate." 171 F. Supp. at 18.

The district court also based its holding upon a finding that Costello falsely swore that he would "support and defend the Constitution" and "bear true faith and allegiance to the same."

Costello also swore that he was "attached to the principles of the Constitution." Just what this

phrase might mean as used in the Nationality Act poses a question of some difficulty. See *Stasiukevich* v. *Nicolls*, 168 F. 2d 474, 477 (C.A. 1st, 1948). We don't believe that the phrase would require a person to believe in the soundness of the Eighteenth Amendment; but at least it would seem to require that the applicant should support an existing provision of the Constitution unless and until it is repealed in an orderly way as provided in Art. V of the Constitution. Therefore, if Costello was at the time engaged in violation of the Eighteenth Amendment and of the Volstead Law, it seems hard to say that he was "attached to the principles of the Constitution."

But the answer to all the foregoing is that the complaint in the present case does not charge that Costello swore falsely in affirming that he was "attached to the principles of the Constitution."

We are not satisfied that the district court was correct in ruling that the oath to "support and defend the Constitution and laws of the United States" means the same as "attached to the principles of the Constitution." It may be urged that the oath which Costello was charged with having violated was merely a political oath calling for a repudiation of allegiance to King Victor Emmanuel III and a statement of allegiance to the United States. We do not have to pass finally on this alleged fraud in the oath, since the first allegation, with reference to the statement of Costello's occupation, is amply supported so as to sustain the charge of fraud and to require us to uphold the decree of denaturalization.

There is only one further point made by appellant that deserves some extended comment. It has to do with the validity of the affirmative defense, specifically pleaded here, that "the complaint is barred under principles of res judicata." We think there is noth-

ing to the point; in fact, we cannot see how any court could accept the argument advanced by appellant except upon an invincible determination to frustrate finally what the court might regard as an undesirable effort by the government to accomplish the cancellation of an old certificate of naturalization.

This is not the first effort by the government to obtain the cancellation of Costello's certificate. On October 22, 1952, the district attorney filed a denaturalization complaint against Costello under § 338 of the Nationality Act of 1940 (54 Stat. 1158). The allegations of fraud were about the same as in the present complaint. But as then permitted by law, cancellation of the certificate of naturalization was also sought on the ground that the certificate was "illegally procured"; that is to say, that the conditions precedent to naturalization, a "good moral character" and an attachment "to the principles of the Constitution," did not in fact exist. As we have previously stated, the latter ground of cancellation was omitted from the present Act.

Though the United States Attorney filed an affidavit of "good cause" prior to the trial of that earlier action, he failed to submit this affidavit simultaneously with the filing of the complaint. The district court entered an order dismissing the complaint "without prejudice." 145 F. Supp. 892 (S.D.N.Y. 1956). The court of appeals reversed, in an opinion having to do solely with so-called "wire tap" evidence. *United States* v. *Costello*, 247 F. 2d 384 (C.A. 2d, 1957). Upon certiorari the Supreme Court, in a one-paragraph *per curiam* opinion, reversed the judgment of the court of appeals upon a ground not theretofore considered by that court, namely, that an affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings and must be filed

along with the complaint when the proceedings are instituted, citing only *United States* v. *Zucca*, 351 U.S. 91 (1956). Accordingly the Supreme Court remanded the case to the district court with directions to dismiss the complaint. 356 U.S. 256 (1958).

When the case got back to the district court, since nothing was said in the Supreme Court mandate about whether the dismissal should be with or without prejudice, the district judge considered that he was bound by the terms of the mandate merely to dismiss the complaint.

There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be "without prejudice." However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In Rule 41(b) of the Federal Rules of Civil Procedure it is provided as follows: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Rule 41(b) does not state what the effect of a prior judgment on the merits is, but if the dismissal of the earlier complaint was really a judgment on the merits we suppose that that would preclude the government as well as a private litigant from filing another complaint based upon the same cause of action, under principles of *res judicata*.

The district court was persuaded by the government's argument that Rule 41(b) had no application because the dismissal was "for lack of jurisdiction" within the meaning of the rule.

No doubt the word "jurisdiction" is a somewhat slippery one, susceptible of various meanings. In holding, as we do, that Rule 41(b) has no application, we prefer not to say that the district court lacked "jurisdiction" to determine the denaturalization complaint despite the lack of a "procedural prerequisite," namely, the filing of an affidavit showing "good cause" simultaneously with the filing of the complaint. Because the phrase "lack of jurisdiction" is used in immediate conjunction with the phrase "for improper venue," it would be plausible to argue that the word "jurisdiction" is used in the rule in its usual restricted sense. See *Title* v. *United States*, 263 F. 2d 28 (C.A. 9th, 1959).

In striking out the words "without prejudice," as proposed by the government, the district court exercised no discretion, as contemplated in the rule, but merely conceived that it was bound by the mandate of the Supreme Court to dismiss the complaint without saying anything about whether it should be with or without prejudice.

The district court did not determine that its dismissal should be regarded as a judgment on the merits. It made no findings as provided in the sentence of Rule 41(b) saying that, "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." And it is obvious that the Supreme Court, in directing such dismissal, did not suppose that it was directing a determination on the merits, which would preclude the government from starting over again, with this particular statutory "procedural prerequisite" duly observed. In the only case cited by the Supreme Court in its brief *per curiam* opinion, *United States* v. *Zucca, supra,* 351 U.S. 91 (1956), the district court had dismissed a complaint for denaturalization, with-

out prejudice to the government's right to institute an action to denaturalize the respondent upon filing an affidavit of good cause. 125 F. Supp. 551 (S.D. N.Y. 1954). The court of appeals affirmed the dismissal (221 F. 2d 805 (C.A. 2d, 1955)) and upon certiorari the Supreme Court in its turn affirmed the judgment of the court of appeals. 351 U.S. 91 (1956). The Supreme Court thought that the district court had correctly dismissed the proceedings because of the failure of the government to file the required affidavit at the time the complaint was filed. But note, that such dismissal had been without prejudice.

It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. And see Restatement, Judgments § 49 (1942).

A judgment will be entered affirming the judgment of the district court.

U.S. GOVERNMENT PRINTING OFFICE: 1958

IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. ~~799~~ 57

UNITED STATES OF AMERICA,
Petitioner,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

RICHARD J. BURKE,
Attorney for Respondent,
MYRON L. SHAPIRO,
Of Counsel,
60 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 789

UNITED STATES OF AMERICA,
Petitioner,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Questions Presented

1. Whether the Court of Appeals had jurisdiction of an appeal which raised only the question whether the District Court had complied with the judgment of this Court in *Lucchese* v. *United States*, 356 U. S. 256, directing dismissal of the denaturalization complaint.

2. If the Court of Appeals had jurisdiction of that question, whether the District Court's entry of an order of dismissal omitting the words "without prejudice" constituted compliance with this Court's judgment remanding with directions "to dismiss the complaint".

Statement

A material fact omitted from the petitioner's statement of the case (Pet. pp. 3-5) is the ground of the respondent's motion to dismiss the Government's appeal to the Court of

Appeals. Respondent's motion was expressly grounded upon lack of jurisdiction of the appeal in the Court of Appeals (Appendix 1, *infra*).

Argument

1. The petitioner does not adequately state (Pet. p. 2) the question presented by its effort to review the dismissal of its appeal to the Court of Appeals, since the dismissal was proper in any event, regardless of the merits of the appeal. The Government by its appeal sought to review in the Court of Appeals the District Court's refusal to incorporate the words "without prejudice" in its dismissal order entered pursuant to this Court's mandate in *Lucchese* v. *United States*, 356 U. S. 256. The only question, therefore, presented by that appeal was whether the District Court had or had not complied with the directions contained in this Court's remand of the case "to dismiss the complaint". But upon clear authority that was a question not within the jurisdiction of the Court of Appeals.

In *Ex parte First National Bank of Chicago*, 207 U. S. 61, where the Circuit Court of Appeals assumed the power to decide that question and give directions to the District Court in a case arising in proceedings in the District Court subsequent to the issue of a mandate from this Court, this Court said (p. 66) "The circuit court of appeals had no jurisdiction in the matter."

In *Ohio Oil Co.* v. *Thompson*, 120 F. 2d 831, cert. den. 314 U. S. 658, the Circuit Court of Appeals for the Eighth Circuit cited *Ex parte First National Bank of Chicago*, *supra* for this proposition, as well as *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, and dismissed the appeal with the following language in part:

> "All these considerations demonstrate that the decision of the question presented by the appeal is not within the jurisdiction of this court. The ques-

> tion calls only for the construction and enforcement of the mandate; and it is for the district court to which the mandate is directed to construe and execute such mandate; and if that court misconstrues or refuses to enforce it or attempts to 'vary it' or 'to intermeddle with it', it is for the Supreme Court alone to construe and enforce its own mandate."

Appeals were dismissed for the same reason in *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 142 F. 2d 549 (C.C.A. 7), and *Ringhiser* v. *Chesapeake & Ohio Railway Co.*, 264 F. 2d 62 (C.C.A. 6). In the case last cited the Circuit Court of Appeals while expressly dismissing the appeal for lack of jurisdiction, took occasion to add, nevertheless, that the District Court's action was in fact in compliance with this Court's mandate.

In *Christoffel* v. *United States*, 214 F. 2d 265, cert. den. 348 U. S. 850, the Court of Appeals for the District of Columbia said:

> "We may not review action taken as required by a mandate of the Supreme Court. It is for that Court to construe its own mandate as to all matters encompassed by it. In re Sanford Fork & Tool Co., 160 U. S. 247, 255-256, 16 S. Ct. 291, 40 L. Ed. 414; Gaines *v.* Rugg, 148 U. S. 228, 238, 13 S. Ct. 611, 37 L. Ed. 432; Ohio Oil Co. *v.* Thompson, 8 Cir., 120 F. 2d 831, certiorari denied 314 U. S. 658, 62 S. Ct. 112, 86 L. Ed. 528."

Since construction of this Court's mandate was not within the jurisdiction of the Court of Appeals, that Court properly dismissed the appeal.

2. If, however, it be thought that the Court of Appeals could properly reach the merits, it is submitted that its dismissal was proper for the reasons stated by it (Pet. p. 11), viz.:

> "Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellish-

ment. We have no occasion now to pass on the effect of that command upon possible later litigation."

If the Government considered this Court's judgment in *Lucchese* v. *United States*, *supra*, 356 U. S. 256, ambiguous, it could have sought amplification by timely application to this Court. But, not having done so, it had no basis for expecting the District Court to improve upon the directions of this Court, in carrying out its ministerial duty, by adding qualification or "embellishment" thereto desired by the Government but not specified by this Court.

3. The petitioner's suggestion (Pet. pp. 9-10) that the decision of the instant petition depend upon the determination of a hypothetical petition for certiorari not yet filed in *United States* v. *Costello* (decided by the Second Circuit February 17, 1960) is altogether without justification, since the questions presented by the two cases are totally different. The suggestion stems from the petitioner's persistent misunderstanding of the limited nature of the questions here presented. What it is seeking seems really to be an advisory opinion as to the *effect* of the dismissal order, although no case or controversy raising that question is now pending.

As the Court of Appeals pointed out, in the instant case the question of the effect of the dismissal order upon a possible second suit (not yet brought) is not reached. Conversely, that question had to be decided in the *Costello* case, and the Court of Appeals there held that the similar refusal of the District Court in that case to add the words "without prejudice" to the dismissal order (entered in accordance with this Court's judgment in *Costello* v. *United States*, 356 U. S. 256) was ineffective to bar a second suit against Costello.

But in the instant case the question is at best only whether the District Court complied with this Court's mandate, if it is first determined that the Court of Appeals

had jurisdiction to consider that question. These questions were not before the Court of Appeals in the *Costello* case, and obviously will not be presented by the hypothetical petition for certiorari possibly to be filed by Costello to review that Court's determination that the order which was entered did not constitute a bar to a second action.

The petitioner unsuccessfully sought in the Court of Appeals to interfwine these two dissimilar cases by moving in that Court for an enlargement of time in the instant case (Appendix 1, *infra* p. 9) until after the termination of *Costello*, but that motion was denied (Appendix 2, *infra*) simultaneously with the dismissal of its appeal, as was its motion for leave to file an untimely petition for rehearing after the *Costello* decision (Pet. p. 10, footnote).

It applied to Mr. Justice Harlan for an extension of time to file this petition for a writ of certiorari (Pet. p. 2) saying:

> "Thus, the decision in the *Costello* case will have an important bearing on the question of whether to seek review of the order dismissing the appeal in this case. If it should be held that the order of dismissal in *Costello* barred a second suit, then the order here could have a continuing effect which may be deemed important enough to future denaturalization proceedings, in this case and others, to justify seeking further review by this Court. For this reason this extension of time is sought until March 14, 1960, by which time, it is hoped, the Second Circuit will have decided the *Costello* case."*

The application was granted with the following endorsement by Mr. Justice Harlan: "Although I can see very little procedural justification for this application, I am constrained to grant the extension sought in the absence of any showing by the respondent that he will be prejudiced thereby."

* The "important bearing" of the Court of Appeals *Costello* decision on the question of whether to file this petition seems now to have been forgotten.

But now the petitioner seeks more than mere delay; it asks that its petition, demonstrated *supra* to be without merit, be granted if Costello's petition is granted, and the two cases heard together (Pet. pp. 9-10). Plainly such a disposition would prejudice the respondent, since he is entitled to an independent consideration of the merits of the petition for certiorari filed herein, rather than a decision depending entirely upon a determination which may be made to review another dissimilar case.

CONCLUSION

Since the Court of Appeals' dismissal of the Government's appeal was proper, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RICHARD J. BURKE,
Attorney for Respondent.
MYRON L. SHAPIRO,
Of Counsel.

April 1960.

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

against

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE,
Appellee.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of RICHARD J. BURKE sworn to the 8th day of October, 1959 and the exhibits annexed thereto, a motion will be made before this Court by the undersigned at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 13th day of October, 1959 at 10:30 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal herein on the ground that this Court lacks jurisdiction thereof.

Dated, New York, October 8th, 1959.

Yours, etc.,

RICHARD J. BURKE
Attorney for Appellee

To:

Hon. CORNELIUS W. WICKERSHAM, JR., Esq.
United States Attorney for the
Eastern District of New York
United States Courthouse
271 Washington Street
Brooklyn 1, N. Y.

UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,

Appellant.

against

Gaetano Lucchese, also known as Thomas Luckese, also known as Thomas Lucase, also known as Thomas Arra, also known as Thomas Luchese,

Appellee.

State of New York)
County of New York) ss.:

Richard J. Burke being duly sworn, deposes and says: I am the attorney for the above-named appellee, and I make this affidavit in support of a motion to dismiss the appeal herein on the ground that this Court lacks jurisdiction thereof.

The Supreme Court of the United States in its opinion herein reported at 356 U. S. 256, granting a petition for a writ of certiorari and reversing the judgment of this Court, on April 7, 1958, remanded the case to the District Court "with directions to dismiss the complaints."

A copy of that judgment of the Supreme Court now on file in the office of the Clerk of the District Court for the Eastern District of New York, certified by the Clerk of the Supreme Court of the United States as of May 9, 1958, is annexed hereto marked Exhibit A. On July 16, 1959 the United States Attorney submitted for signature to the United States District Court a proposed "Order

on Judgment" providing for the dismissal of the complaint "without prejudice". On the same day deponent submitted a proposed "Order on Judgment" which was identical with the Government's proposed order except that it omitted the words "without prejudice." This latter order was the one signed by the District Judge, and a copy is annexed hereto marked Exhibit B.

The Government moved before the District Court on July 24, 1959 to resettle the Order on Judgment so as to include the words "without prejudice", and that motion was argued and denied.

On September 11, 1959 the Government appealed to this Court from so much of the Order on Judgment as failed to specify that the dismissal was "without prejudice" and also from the denial of its motion to resettle that order.

The Government has moved before this Court for an enlargement of time in connection with that appeal, and deponent has submitted an affidavit in opposition thereunto, annexed to which is a copy of the Government's notice of appeal, to which the Court is respectfully referred, since both motions are being heard at the same time.

The Supreme Court not having included the words "without prejudice" in its opinion and judgment, the District Court has also refrained from using such language in its order entered in compliance with the Supreme Court mandate. The present appeal therefore concerns itself solely with the question of whether the District Court has properly construed and obeyed the mandate of the Supreme Court. It is well settled, as the cases cited in the memorandum submitted herewith demonstrate, that that question is not within the jurisdiction of this Court. It is for the Supreme Court alone to construe and

enforce its mandate. Therefore this appeal should be dismissed.

Sworn to before me this 8th day of October, 1959.

RICHARD J. BURKE

RUTH FLAX
Notary Public, State of New York
No. 03-6331000
Qualified in Bronx County
Commission Expires March 30, 1960

EXHIBIT A

SUPREME COURT OF THE UNITED STATES

No. 450. OCTOBER TERM, 1957

13052

GAETANO LUCCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Second Circuit, and was duly submitted.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said United States Court of Appeals, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of New York with direction to dismiss the complaint. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca*, 351 U. S. 91, 99-100.

April 7, 1958

A true copy

John T. Fay,

(SEAL)

Test:

Clerk of the Supreme Court of the United States

Certified this Ninth day of May 1958

By .....

Deputy

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Civil Action No. 13052

UNITED STATES OF AMERICA,

Plaintiff,

against

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE,

Defendant.

ORDER ON JUDGMENT

At Brooklyn, New York, in said District, on the 16th day of July, 1959.

Plaintiff having appealed to the United States Court of Appeals for the Second Circuit from an Order of this Court dated and entered on October 15th, 1956, dismissing the Complaint herein without prejudice to plaintiff's right to institute a proceeding to denaturalize defendant upon the filing of an Affidavit showing good cause therefor, and that Court having reversed said Order by Judgment dated and entered on June 17th, 1957, and defendant having thereafter petitioned the Supreme Court of the United States for a Writ of Certiorari, and that Court having granted same and then rendered Judgment on April 7th, 1958, and a certified copy of said Judgment having been duly filed by the Clerk of this Court on May 12th, 1958.

Now, on motion of Richard J Burke, attorney for the defendant, it is

ORDERED, ADJUDGED AND DECREED that said Judgment of the Supreme Court of the United States be, and the same hereby is made the Judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the Complaint herein be, and the same hereby is dismissed without costs to either party.

ROBERT INCH
United States District Judge.

Appendix 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE,

Appellee.

Appellant's motion to extend time denied. See memorandum on appellee's motion to dismiss, filed herewith.

C. E. C.
U. S. C. J.
J. J. S.
U. S. D. J.

October 15, 1959

No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Petitioner*

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
EUGENE L. GRIMM,

Attorneys,

Department of Justice,
Washington 25, D. C.

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CITATIONS

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OCTOBER TERM, 1960

No. 57

UNITED STATES OF AMERICA, *Petitioner*

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 41) is not reported. The order on judgment of the District Court (R. 30-31) and the order of the District Court denying the motion of the United States to resettle the order on judgment (R. 36) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1959 (R. 42). On January 12, 1960, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including March 14, 1960. The petition was filed on that day and granted on May

16, 1960. 362 U.S. 973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government is entitled to have the order of dismissal of the denaturalization complaint against respondent, directed by this Court in *Lucchese* v. *United States*, 356 U.S. 256, specify that the dismissal is without prejudice to the filing of a new complaint.[1]

RULE INVOLVED

Rule 41(b) of the Federal Rules of Civil Procedure provides:

> (b) *Involuntary Dismissal: Effect Thereof.*
>
> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court

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[1] In *Costello* v. *United States*, No. 59, this Term, the petitioner moved to amend his petition for a writ of certiorari to raise a somewhat different but related issue. On May 16, 1960, this Court assigned that motion for hearing with the argument on the merits in this case. 362 U.S. 973. Since the issues on the motion in *Costello* arise in a different context, we are briefing them separately.

renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

STATEMENT

On November 17, 1952, a denaturalization complaint was filed against respondent in the United States District Court for the Eastern District of New York (R. 1-6). In accordance with the then current practice, the "good cause" affidavit required by the pertinent statute (now 8 U.S.C. 1451(a)) was not filed with the complaint. The District Court, on respondent's motion, entered a dismissal order conditioned on failure to file the affidavit within fifteen days (R. 11, 14, 23). The affidavit was so filed (R. 7-8). On reargument following the decision in *United States* v. *Zucca*, 351 U.S. 91,[2] and before trial, the District Court dismissed the complaint for failure to file the affidavit with the complaint, "without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon the filing of the required affidavit" (R. 14-15; 149 F. Supp. 952). On appeal by the government, the Court of Appeals for the Second Circuit reversed, holding that the dismissal motion should have been denied (R. 17-27; *United States* v. *Lucchese*, 247

[2] In that case this Court held that the filing of the affidavit of good cause was a prerequisite to the initiation of a denaturalization proceeding

F. 2d 123). On April 7, 1958, this Court reversed the judgment of the Court of Appeals and ordered the case "remanded to the District Court with directions to dismiss" the complaint (R. 29; *Lucchese* v. *United States* (together with *Matles* v. *United States*, and *Costello* v. *United States*), 356 U.S. 256, 257).[3]

Upon remand pursuant to this Court's judgment, the government submitted to the District Court a proposed form of order dismissing the complaint "without prejudice." (R. 33). The District Court (Inch, D.J.) rejected this form and, instead, on July 16, 1959, entered an order of dismissal which did not specify whether it was with or without prejudice (R. 30-31). The government moved for settlement of the dismissal order. At the argument of the motion, government counsel sought to ascertain from the District Court whether in entering the order the court was in any way passing on the question of whether the dismissal constituted a bar to subsequent action by the government looking to the denaturalization of respondent. The District Court responded that it was going no further than to follow this Court's direction that the complaint be dismissed. (R. 34-35). The motion for resettlement was denied on July 24, 1959 (R. 36).

The government appealed to the Court of Appeals for the Second Circuit from so much of the order of

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[3] The *per curiam* order read in pertinent part (356 U.S. at 257): "In Nos. 450 [*Lucchese*] and 494 [*Costello*] the judgments of the Court of Appeals for the Second Circuit are reversed and the cases are remanded to the District Court with directions to dismiss the complaints. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States* v. *Zucca*, 351 U.S. 91, 99-100."

dismissal as provided for mere dismissal of the denaturalization complaint and failed to specify that the dismissal was without prejudice, and from the order, *supra*, denying the motion for resettlement of the order of dismissal (R. 37). On October 15, 1959, the Court of Appeals, on respondent's motion, dismissed the government's appeal (R. 41-42). The *per curiam* order dismissing the appeal said (*ibid.*):

> Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

SUMMARY OF ARGUMENT

As explained in our petition for a writ of certiorari, the government sought review of the order of the Court of Appeals in this case primarily to protect its interests pending the determination of a related question in *United States* v. *Costello*, No. 59, this Term. In both cases, affidavits had not been filed with the complaints, this Court remanded the cases to the respective District Courts with directions to dismiss the complaints, and the District Courts (considering themselves bound to dismiss the denaturalization complaints without qualifying language) entered orders of dismissal which did not specify whether they were with or without prejudice. Thereafter, in a new denaturalization action instituted against him, Costello contended that the government should have appealed from the order entered on remand if it wished to have the dismissal operate as without prejudice. This contention was

rejected by the District Court and by the Court of Appeals. However, since this Court had not ruled on the matter, the government filed a petition for a writ of certiorari in the present case to preserve its right to proceed against this respondent in a new proceeding in the event that this Court should rule in *Costello* that the order entered by the District Court on the remand of that case precluded the institution of a new denaturalization action in *Costello,* and that the government's failure to appeal from that order barred the subsequent suit. It is our position that the District Courts erred in concluding that they lacked authority to add the words "without prejudice" to the orders of dismissal, but that the government was not barred from instituting a new denaturalization proceeding by the omission of these words, since there has never been an adjudication on the merits of either case.

I

When this case came before this Court in 1958, the District Court had entered an order dismissing the denaturalization complaint "without prejudice" to the government's right to institute a proceeding to denaturalize the defendant upon the contemporaneous filing of the required affidavit. The Court of Appeals then reversed, holding that the affidavit need not be filed with the complaint. The only question which this Court decided was whether a complaint should be dismissed for lack of an accompanying affidavit. When, therefore, the Court reversed the judgment of the Court of Appeals and remanded the cause to the District Court with directions to dismiss the complaint, it was upholding the original action of the District Court in dismissing the complaint without prejudice.

Moreover, the 1958 decision of this Court in this case was placed squarely on the Court's earlier decision in *United States* v. *Zucca*, 351 U.S. 91. In that case, on the government's failure to file an affidavit of good cause, the District Court had dismissed the complaint without prejudice to the government's right to institute a new denaturalization action upon filing the affidavit. This Court expressly affirmed that action. Thus, the Court's decision in this case, remanding the cause with directions to dismiss, appears quite clearly to have contemplated a dismissal without prejudice.

II

Since, as we have shown, the decision of this Court at the earlier stage of this case clearly contemplated a dismissal without prejudice, the District Court had power to enter a judgment specifically so providing, even though this Court merely remanded the cause with directions to dismiss the complaint. While a lower court cannot reconsider questions which the mandate has laid at rest, it is free as to any issue within its jurisdiction which was not settled by the higher court's decision. This Court has always construed its own mandates so as to restrict the area of compelled obedience to the precise issues expressly or necessarily decided by this Court.

Here, the reinstatement of the original judgment dismissing the complaint "without prejudice" involved no departure from the issues decided by this Court, in 1958, in *Lucchese* v. *United States*, 356 U.S. 256. Such a judgment would merely have made explicit the implication of this Court's mandate. The District

Court, therefore, had the power to enter, and should properly have entered, a judgment dismissing the complaint without prejudice.

ARGUMENT

As explained in our petition for a writ of certiorari, the government sought review of the order of the Court of Appeals in this case primarily to protect its interests pending the determination of a related question in *United States* v. *Costello,* No. 59, this Term. In the *Costello* case, as in this one, an affidavit had not been filed with the complaint. In *Costello,* as here, this Court remanded the cause to the District Court with directions to dismiss the complaint. 356 U.S. 256. The District Court in that case (the District Court for the Southern District of New York), like the District Court in this case, considered itself bound by the terms of this Court's mandate to dismiss the denaturalization complaint without qualifying language and entered an order of dismissal which did not specify whether it was with or without prejudice. Thereafter, in a new denaturalization action instituted against him, Costello contended that the new action was barred since the first had not been dismissed without prejudice; and that the government, if it had wished to have the first dismissal operate as without prejudice, should have appealed from the order entered by the District Court after the remand by this Court. This contention was rejected by the District Court and by the Court of Appeals. However, since this Court had not ruled on the matter, the government filed a petition for a writ of certiorari in the present case to preserve its right to proceed against this respondent in a new proceeding in the event that this Court should rule in *Costello* that

the order entered by the District Court on the remand precluded the institution of a new denaturalization action in *Costello*, and that the government's failure to appeal from that order barred the subsequent suit.

As we shall argue in *Costello*, we believe that the Court of Appeals in that case properly ruled that dismissal of the complaint pursuant to the mandate of this Court for failure to file an affidavit with the complaint did not bar the institution of a new action, and that the government was not required to insist that the order of dismissal specify that it was without prejudice. However, we also believe that in this case under the mandate of this Court the District Court did have authority to reinstate the order appealed from (dismissing the action without prejudice) and that the division of the Court of Appeals which decided this case[4] was in error in ruling that the District Court could not add the words "without prejudice" to the order of dismissal. The addition of such words would carry out the clear intent of this Court in remanding the cause and therefore would be entirely consistent with the mandate.

I

The Decision of This Court Contemplated Dismissal of the Complaint Without Prejudice

When this case came before this Court in 1958, the District Court had entered an order dismissing the denaturalization complaint "without prejudice" to the

[4] The division of the court below which decided the *Costello* case said in its opinion in that case: "There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be 'without prejudice'. However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken • • •". 275 F. 2d 355, 361.

government's right to institute a proceeding to denaturalize the defendant upon the contemporaneous filing of the required affidavit (R. 14-15). There had been no consideration of the merits of the action. The Court of Appeals then reversed, holding that the affidavit need not be filed with the complaint (R. 24, 247 F. 2d 123, 128). With the case in this posture, this Court reversed the judgment of the Court of Appeals and directed the District Court to dismiss the complaint. The only question which the Court decided was whether a complaint should be dismissed for lack of an accompanying affidavit. When, therefore, the Court reversed the judgment of the Court of Appeals and remanded the cause to the District Court with directions to dismiss the complaint, it was upholding the original action of the District Court in dismissing the complaint. Since the original dismissal was "without prejudice", the action affirmed by the decision of this Court was a dismissal without prejudice.

Moreover, the decision in *Lucchese* v. *United States*, 356 U.S. 256, was placed squarely on the Court's earlier decision in *United States* v. *Zucca*, 351 U.S. 91. In that case, on the government's failure to file an affidavit of good cause, the District Court had dismissed the complaint *without prejudice* to the government's right to institute a new denaturalization action upon filing the affidavit. The Court of Appeals affirmed and this Court granted certiorari to resolve a conflict among the Courts of Appeals (*id.* at 92). The Court then affirmed the judgments of the lower courts, holding that in denaturalization proceedings the affidavit of good cause must be filed "as a prerequisite to the initiation of such proceedings", and adding that the District Court "correctly dismissed the proceedings in this case

because of the failure of the Government to file the required affidavit * * * " (*id.* at 100). The action which this Court expressly affirmed was a dismissal without prejudice.[5] Thus, the Court's decision in *Lucchese, supra,* remanding the cause with directions to dismiss, appears quite clearly to have contemplated a dismissal without prejudice.

II

The District Court Had Authority Under the Mandate to Specify That the Dismissal Was Without Prejudice

Since, as we have shown, the decision of this Court at the earlier stage of this case clearly contemplated a dismissal without prejudice, the District Court had power to enter a judgment specifically so providing, even though this Court merely remanded the cause with directions to dismiss the complaint. While it is "familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest," (*Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 140), that mandate leaves the lower court free as to any issue within its jurisdiction which was not settled by the higher court's decision. *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 168; *Ex Parte Century Indemnity Company,*

[5] In *United States* v. *Diamond*, 356 U.S. 257, which was decided on the same day as *Lucchese* v. *United States*, 356 U.S. 256, the affidavit of good cause was filed on the first day of trial, rather than on the date the complaint was filed. When *United States* v. *Zucca, supra,* was decided, the District Court in *Diamond* dismissed the denaturalization action without prejudice (Pet. p. 4, No. 771, O.T. 1957). In a *per curiam* opinion this Court granted the government's petition for a writ of certiorari and affirmed the judgment of the Court of Appeals, which had itself affirmed the District Court's dismissal without prejudice.

305 U.S. 354, 355-356; *In re Sanford Fork and Tool Company*, 160 U.S. 247, 255-256; *Mason* v. *Pewabic Mining Company*, 153 U.S. 361, 366; *Christoffel* v. *United States*, 214 F. 2d 265, 266 (C.A. D.C.), certiorari denied, 348 U.S. 850; *Ohio Oil Company* v. *Thompson*, 120 F. 2d 831, 835 (C.A. 8), certiorari denied, 314 U.S. 658; see *Schuylkill Trust Company* v. *Pennsylvania*, 302 U.S. 506, 512; compare *National Association For The Advancement of Colored People* v. *Alabama*, 360 U.S. 240, 244-245; *Deen* v. *Hickman*, 358 U.S. 57, 58. This Court has always construed its own mandates so as to restrict the area of compelled obedience only to the precise issues expressly decided by this Court, and to such other issues as were necessarily decided by implication.

In *Ticonic Bank* v. *Sprague*, 303 U.S. 406, the Court held that a secured creditor of a national bank, holding a non-interest-bearing claim, was entitled to both principal and interest from the date of the insolvency of the bank even though the total assets of the bank were not sufficient to pay the claims of all creditors, so long as the security as to which the secured creditor had a lien was of sufficient value to pay both principal and interest. Under principles of *stare decisis*, Sprague, by establishing her claim, also established the claims of fourteen other trusts secured by the same assets to participate in those assets to the extent of both principal and interest. She therefore petitioned the District Court to allow the payment of reasonable attorney's cost out of the earmarked assets, although she had not purported to sue for a class nor sought formally to establish a fund available to the class. The District Court denied the petition, holding that this Court's mandate foreclosed that issue and deprived the

District Court of discretion to do anything except issue its execution for a certain sum of money plus costs between party and party. On writ of certiorari, this Court held (*Sprague* v. *Ticonic Bank*, *supra*, 307 U.S. 161, 168-169) that the claim for costs "as between solicitor and client" was not directly in issue in the original proceeding and was sufficiently different from that presented by the ordinary questions regarding taxable costs so that it was not impliedly covered by this Court's mandate.

Ex Parte Century Indemnity Company, *supra*, 305 U.S. 354, is another illustration of the proposition that this Court has held the operation of its mandates to narrow limits. There, the Court of Appeals had originally refused to consider certain assignments of error upon the ground that they related to findings requested by the defendant after the trial had been concluded. This Court reversed, holding that the point at which the defendant made his request was not too late to present special findings of fact. *Century Indemnity Company* v. *Nelson*, 303 U.S. 213, 216-217. On remand, the Court of Appeals refused to consider the assignments of error addressed to the rejection of these findings on the ground that the findings were not incorporated in the bill of exceptions—a ground not earlier considered by the lower court. This Court discharged its rule to shown cause why a writ of mandamus should not issue, holding that on these facts it could not direct the Court of Appeals to consider the assignments of error. 305 U.S. at 356. Necessary to this conclusion was the view that, on remand, the Supreme Court's mandate left the lower court free to find another sufficient ground (not earlier considered) for rejecting the assignments of error.

Here, the reinstatement of the original judgment dismissing the complaint "without prejudice" involved no departure from the issues decided by this Court in *Lucchese* v. *United States*, 356 U.S. 256. Such a judgment would merely have made explicit the implications of this Court's mandate. The District Court therefore had the power to enter, and should properly have entered, a judgment dismissing the complaint without prejudice.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause should be remanded to the District Court with directions that it enter a judgment dismissing the complaint without prejudice to the filing of a new complaint.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 57

UNITED STATES OF AMERICA,
Petitioner,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Questions Presented*

1. Whether the Court of Appeals had jurisdiction of an appeal which raised only the question whether the District Court had complied with the judgment of this Court in *Lucchese* v. *United States*, 356 U. S. 256, directing dismissal of the denaturalization complaint.

* The petitioner's phrasing of the question presented (Brief p. 2) ignores the procedural posture of the case. Respondent believes for reasons hereinafter set forth that only the questions as here set forth are properly before the Court in this proceeding.

2. If the Court of Appeals had jurisdiction of that question, whether the District Court's entry of an order of dismissal omitting the words "without prejudice" constituted compliance with this Court's judgment remanding with directions "to dismiss the complaint".

Statement

A material fact omitted from the petitioner's statement of the case (Brief pp. 3-5) is the ground of respondent's motion to dismiss the Government's appeal to the Court of Appeals. Respondent's motion was expressly grounded upon lack of jurisdiction of the appeal in the Court of Appeals (R. 39). The Court of Appeals' order and judgment, now before this Court for review, which dismissed the appeal, specifically refers to this ground of respondent's motion (R. 42).

Summary of Argument

1. If petitioner deemed this Court's judgment directing dismissal of the complaint (R. 29) in *Lucchese* v. *United States,* 356 U. S. 256 too sweeping a disposition of the case, or for some reason considered the direction to be ambiguous, it might have petitioned for rehearing within twenty-five days of the judgment pursuant to Rule 58 of this Court's Rules, and sought modification, amendment, or clarification of the judgment. It did not do so. A correct decision by the Court of Appeals as to its jurisdiction ought not be reversed, because the petitioner failed to seek relief by appropriate procedure and at the proper time.

The petition for certiorari granted by this Court sought review of the Court of Appeals' order dismissing the Government's appeal for lack of jurisdiction. Since con-

struction of this Court's mandate directed to the District Court to dismiss the denaturalization complaint was not within the jurisdiction of the Court of Appeals, that Court properly dismissed the appeal. Upon clear authority a Court of Appeals has no jurisdiction to determine whether a District Court has complied with a mandate of this Court. Hence its order dismissing the Government's appeal should be affirmed.

2. The District Court, in carrying out its ministerial duty of effectuating this Court's mandate, properly refused to add the words "without prejudice" to its order dismissing the complaint. This Court had included no such qualification in its direction to the District Court. The District Court was not entitled to intermeddle with this Court's judgment by attempted embellishment of it to suit the Government's wishes.

There was no necessary implication (as claimed by petitioner) in this Court's judgment that the dismissal to be entered should be without prejudice. The only issue briefed before this Court in *Lucchese* v. *United States*, 356 U. S. 256, and companion cases simultaneously decided, was whether the statutory affidavit must be filed with the complaint in a denaturalization case. The issue of whether a dismissal for failure to do so must necessarily and always be without prejudice to filing a new suit was not before this Court in those cases, nor in *United States* v. *Zucca*, 351 U. S. 91, and hence was not determined. This Court in affirming the dismissal in *United States* v. *Zucca, supra*, avoided expressing approval of the fact that the original dismissal by the District Court had been "without prejudice".

If, as inconsistently claimed by petitioner, the District Court was left "free" as to this issue because the issue had not been settled by this Court's decision, there is no basis for a finding that the issue was improperly decided by the District Court.

The equities of the situation did not favor a grant of leave to reinstitute the action, since the Government had delayed fifteen months from the date of this Court's judgment before submitting an order on judgment to the District Court; and the original action filed in 1952 was predicated on an alleged failure in 1941 by the respondent to disclose to naturalization examiners arrests many years before on charges which were never prosecuted, although he disclosed to them the only charge upon which he had ever been convicted. Under such circumstances the District Court, if it had discretion, was entitled to dismiss with prejudice; certainly it had no reason to suppose that this Court by implication had directed that leave be granted to reinstitute such an action.

ARGUMENT

I

The Court of Appeals rightly dismissed the Government's appeal for lack of jurisdiction.

The petitioner phrases the question presented (Brief p. 2) as though it were now belatedly seeking rehearing, and modification, or amendment, or amplification of this Court's mandate in *Lucchese* v. *United States*, 356 U. S. 256. But this is to lose sight of the fact that the Government's petition for a writ of certiorari here (Pet. p. 1) sought to review a dismissal of its appeal by the Court of Appeals based upon lack of jurisdiction. Since the Court of Appeals was without jurisdiction of the Government's appeal, the dismissal by that Court was proper in any event and should therefore be affirmed.

The Government by its appeal (R. 37) to the Court of Appeals sought to review in that Court the District Court's refusal to incorporate the words "without prejudice" in its dismissal order entered pursuant to this Court's mandate in *Lucchese* v. *United States*, 356 U. S. 256. The only question, therefore, which was presented by that appeal was whether the District Court had or had not complied with the directions contained in this Court's remand of the case "to dismiss the complaint" (R. 29). Since that was a question which was plainly not within the jurisdiction of the Court of Appeals, respondent moved to dismiss the appeal upon that ground (R. 39). The order of the Court of Appeals now under review, which granted respondent's motion, specifically recites that the motion was one to dismiss "for lack of jurisdiction" (R. 42).

In *Ex parte First National Bank of Chicago*, 207 U. S. 61, where the Circuit Court of Appeals assumed the power to decide a question of compliance with this Court's mandate and to give directions to the District Court in a case arising in proceedings in the District Court subsequent to the issue of a mandate from this Court, this Court said (p. 66) "The circuit court of appeals had no jurisdiction in the matter."

In *Ohio Oil Co.* v. *Thompson*, 120 F. 2d 831, cert. den. 314 U. S. 658, the Circuit Court of Appeals for the Eighth Circuit cited *Ex parte First National Bank of Chicago*, *supra* for this proposition, as well as *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, in dismissing such an appeal.

See also *Christoffel* v. *United States*, 214 F. 2d 265, (C.A.D.C.), cert. den. 348 U. S. 850.

Appeals were dismissed for the same reason in *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 142 F.

2d 549 (C.C.A. 7), and *Ringhiser* v. *Chesapeake & Ohio Railway Co.*, 264 F. 2d 62 (C.C.A. 6). In the case last cited the Circuit Court of Appeals while expressly dismissing the appeal for lack of jurisdiction, took occasion to add, nevertheless, as did the Court of Appeals in the present case (R. 41), that the District Court's action was in fact in compliance with this Court's mandate. Such observation, while in our view correct, was nevertheless, it is respectfully submitted, mere *obiter dicta*.

Since construction of this Court's mandate was not within the jurisdiction of the Court of Appeals, that Court properly dismissed the appeal.

The Government might have sought rehearing pursuant to Rule 58 of this Court's Rules within 25 days after this Court's decision of this matter on April 7, 1958 (356 U. S. 256), in order to attempt to secure modification or amendment of this Court's mandate, but it did not do so. Instead, it now seeks to review by certiorari proceedings a dismissal by the Court of Appeals which the Court of Appeals was obliged to grant. Hence the order of the Court of Appeals should be affirmed by this Court.

II

The District Court's order of dismissal complied with this Court's mandate.

The question whether the District Court's entry of an order dismissing the denaturalization complaint and omitting the words "without prejudice" constituted compliance with this Court's mandate—although in our view not properly reached here upon certiorari proceedings to review the Court of Appeals' dismissal of petitioner's

appeal for lack of jurisdiction—must (if it is to be considered) be answered in the affirmative.

The Government's argument on this point is hardly consistent. It argues that this Court's mandate "contemplated" a dismissal without prejudice, and that such a dismissal was necessarily implied in this Court's mandate, and hence that the District Court was actually obliged to enter only such a dismissal.

That part of its argument would seem to impose upon the District Court the quite unwarranted requirement that it read into this Court's unambiguous mandate to dismiss unstated directions of substantial effect and add them to the dismissal order.

Surely this would be the very "embellishment" and "intermeddling" by the District Court which has been forbidden to the District Courts in carrying out the merely ministerial duty of effectuating mandates.

In *Sibbald* v. *United States*, 12 Pet. 488, 9 L. Ed. 1167, this Court said:

> "The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded."

Many authorities to the same effect are cited in *Thornton* v. *Carter*, 109 F. 2d 316, 320, footnote 4.

There is no basis whatsoever for petitioner's argument that the dismissal directed by this Court necessarily implied a dismissal without prejudice, and that it should have been so understood by the District Court.

The question whether a dismissal against the United States of a denaturalization case for failure to file the statutory affidavit should be with or without prejudice to further proceedings was not before this Court when it decided *Lucchese* v. *United States,* 356 U. S. 256, and hence it was not decided, and could not have been decided, either expressly or by implication.

Similarly in *United States* v. *Zucca,* 351 U. S. 91, 100, this Court concluded its opinion with the words,

> "The District Court below correctly dismissed the proceedings in this case because of the failure of the Government to file the required affidavit and the judgment of the Court of Appeals is therefore Affirmed."

This Court refrained from stating that the District Court in *Zucca* had correctly dismissed "without prejudice". The propriety of the original dismissal having been "without prejudice" was not before this Court in the *Zucca* case, certiorari having been neither sought nor granted to review that particular question, any more than it was in *Lucchese* v. *United States, supra,* or in *United States* v. *Diamond,* 356 U. S. 257 cited by petitioner.

This Court has never stated that dismissals for failure to file the statutory affidavit in time must necessarily be without prejudice to a new action. In the present case good reasons existed to terminate this proceeding with finality. The District Court was aware of them, and in seeking to carry out this Court's unambiguous direction had no basis for conjuring up implications to the contrary, as the Court of Appeals indicated in its opinion herein (R. 41).

From page 11 to page 13 of its Brief the Government argues, inconsistently, that the District Court might

properly have included the words "without prejudice" in its order because the District Court was left "free as to any issue within its jurisdiction which was not settled by the higher court's decision." This would seem to amount to a contention that since this Court did not rule on whether the dismissal should be with or without prejudice, having had before it an entirely different question, its judgment left the District Court free to enter a dismissal without prejudice, or, for that matter, with prejudice, as it saw fit. If the District Court was indeed "free" in this respect, and entitled to exercise its discretion, petitioner has no standing here. There is certainly no showing that such discretion, if it existed, was abused.

Respondent came to this country at the age of 11 and is now almost 62 years old (R. 1). This proceeding to denaturalize him was commenced in November 1952 upon the peculiar and paradoxical charge, in substance, that when applying for naturalization in 1941, although he disclosed to the examiners his only conviction for crime, he failed to disclose mere arrests many years before where he was discharged without prosecution (R. 1-6).*

In *United States* v. *Zucca, supra,* this Court said:

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once

* *Cf. Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 241: "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that some one probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated."

> admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded."

It was through no fault of respondent that the Government failed to file its statutory affidavit in his case until three years (R. 7) after the proceeding was commenced, when it was compelled to do so.

After this Court's judgment of April 1958 merely directing dismissal of the complaint the Government filed no petition for rehearing; and it waited *fifteen months* before even attempting to enter in the District Court an order of dismissal "without prejudice." (R. 29-33).

The District Court's informal remark upon the hearing of the Government's motion to resettle its order (which it denied), "We have been fooling around with this thing for some time" (R. 35), is pregnant with significance in this context of dilatoriness. Eight years after starting this action to denaturalize respondent, and nineteen years after his application for naturalization, petitioner now belatedly seeks to lay the groundwork to start the case anew, with complete disregard for the respondent's reputation, or for his ability to secure witnesses to testify in his defense after so great a period of time. The contention that the District Court should have reasoned that this Court "by implication" directed so inequitable a result is little short of preposterous.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the judgment of the Court of Appeals should be affirmed and the order of the District Court should be left undisturbed.

RICHARD J. BURKE,
Attorney for Respondent.

MYRON L. SHAPIRO,
Of Counsel.

October, 1960.

No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As respondent views this case, the government erred in taking its appeal to the Court of Appeals in an attempt to correct the District Court's error in refusing to add the words "without prejudice" to the order dismissing the denaturalization complaint. He argues that only this Court has the power to determine whether the District Court complied with the Court's mandate in *Lucchese* v. *United States*, 356

U.S. 256, and that the Court of Appeals had no jurisdiction over the subject matter of the government's appeal. Pointing out that he moved to dismiss the appeal on this basis, respondent reads agreement with his contention into the order of the Court of Appeals, and concludes that this Court should therefore affirm the action by the lower court as having been proper when taken.

The Court of Appeals did not hold that it had no jurisdiction to entertain the government's appeal. It is true that the order dismissing the appeal recites that respondent moved to dismiss the appeal for lack of jurisdiction and that the motion "hereby is granted" (R. 42). However, the opinion of the Court of Appeals [1] can be read only as deciding that the District Court acted correctly, not that the Court of Appeals had no authority to pass on the soundness of that action. "Upon clear authority and in reason," the appellate court said (R. 41),

> there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

There is nothing in this that suggests a holding that the Court of Appeals had no power to consider the merits of the trial court's action. To dismiss this

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[1] The opinion is to be consulted in determining the reason for the entry of an order. *In re Sanford Fork and Tool Company*, 160 U.S. 247, 256; *West* v. *Brashear*, 39 U.S. (14 Pet.) 51, 54-55; *Gaines* v. *Rugg*, 148 U.S. 228, 237-239.

language as "mere *obiter dicta*," as does respondent (Br., p. 6) is to characterize the entire opinion by the Court of Appeals as *obiter*, for we have set it forth in its entirety, except for an opening sentence noting the action taken.

The merits of respondent's contention, that an appeal did not lie to the Court of Appeals, depend on the merits of the main issue in the case—whether the District Court had power to do more than mechanically copy this Court's mandate into an order of dismissal. There is authority for the proposition that, where the trial court to which the mandate of this Court is directed refuses to obey or misconstrues that mandate, only this Court has "jurisdiction" to correct the error. See *Ex parte First National Bank of Chicago*, 207 U.S. 61, 66; *Ohio Oil Company* v. *Thompson*, 120 F. 2d 831, 835 (C.A. 8), certiorari denied, 314 U.S. 658; *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Company*, 142 F. 2d 549, 550 (C.A. 7); *Ringhiser* v. *Chesapeake and Ohio Railway Company*, 264 F. 2d 62, 63 (C.A. 6).[2] It is equally well established that the decision of the District Court on remand as to new issues, or issues left open by this Court's mandate, can be reviewed only by a new appeal to the proper appellate court

[2] We do not believe that *Baltimore and Ohio Railroad Company, et al.* v. *United States*, 279 U.S. 781, stands for the proposition that the Court of Appeals is to be by-passed. In that case the appeal was properly taken directly to this Court under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, as an appeal from a final decree by a three-judge District Court setting aside an order of the Interstate Commerce Commission.

—in this case, the Court of Appeals for the Second Circuit. *Mason* v. *Pewabic Mining Company*, 153 U.S. 361, 366; *Ex parte The Union Steamboat Company*, 178 U.S. 317, 319-320; *Christoffel* v. *United States*, 214 F. 2d 265, 266-267 (C.A. D.C.), certiorari denied, 348 U.S. 850; *Illinois Bell Telephone Company* v. *Slattery, et al*, 98 F. 2d 930, 932-934 (C.A. 7); see *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 162-164. The question of authority to review the action taken by the District Court depends, therefore, upon whether this Court's mandate left open the question of whether the words "without prejudice" could (as the government argued) permissibly be inserted in the order of dismissal. If they could, then authority to review the erroneous refusal to give the government the relief it requested resided in the Court of Appeals. In short, the question of which court has power to review, raised by respondent, depends upon this Court's view of the merits of this case, *i.e.*, whether it was open to the District Court (under this Court's mandate) to order a dismissal without prejudice.

In any event, we do not accept respondent's suggestion that, if the District Court had no power to do more than copy this Court's mandate *in haec verbis* into an order of dismissal, the government's only remedy was to seek rehearing of this Court's decision under Rule 58 of the Court's Rules (Br., p. 6). The authority flowing from 28 U.S.C. 1651 to issue extraordinary writs persists even though the term of court in which the mandate was issued has

expired. *United States* v. *District Court*, 334 U.S. 258, 262-265. Hence, the scope of the mandate can be clarified now, in the present proceeding.

Respectfully submitted.

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Solicitor General.

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NOVEMBER 1960.

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SUPREME COURT OF THE UNITED STATES

No. 57.—October Term, 1960.

United States, Petitioner, v. Gaetano Lucchese, etc.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 20, 1961.]

Mr. Justice Brennan delivered the opinion of the Court.

This denaturalization proceeding was brought in the District Court for the Eastern District of New York under § 338 (a) of the Nationality Act of 1940. 8 U. S. C. § 738. The "good cause" affidavit was not filed with the complaint. The District Court dismissed the complaint following our decision in *United States* v. *Zucca*, 351 U. S. 91, "without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon the filing of the required affidavit." 149 F. Supp. 952. The Court of Appeals for the Second Circuit reversed, holding that the dismissal motion should have been denied. 247 F. 2d 123. We reversed and ordered the case "remanded to the District Court with directions to dismiss" the complaint. 356 U. S. 256. The District Court on the remand declined to order a dismissal "without prejudice" and instead entered an order which did not specify whether the dismissal was with or without prejudice. The Court of Appeals for the Second Circuit dismissed the Government's appeal in an unreported opinion which stated that "there was no basis for [the district judge] to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation."

The Government filed its petition for certiorari only to assure its right to proceed against the respondent in a new proceeding in the event that we should rule in *Costello* v. *United States, ante*, p. —, that the order entered by the District Court for the Southern District of New York in that case precluded the institution of the second denaturalization action against Costello. Our decision today in *Costello* establishes that such a form of dismissal does not bar a subsequent proceeding against the respondent. The writ is therefore

Dismissed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.